Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

STANLEY T. TORRES and JEANNE H. RAYPHAND,
Appellants,

v.

MIGUEL M. SABLAN, etc.
Appellees,
UÑITED STATES OF AMERICA, etc.
Intervenors.

On Appeal From The
United States District Court
For The Northern Mariana Islands

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the right of every person to equal voting opportunity in local elections, as defined in *Reynolds v. Sims*, is a fundamental right which cannot be impaired by the Commonwealth of the Northern Mariana Islands or the Congress of the United States under the *Insular Cases* doctrine.

LIST OF ALL PARTIES

Plaintiffs:

Jeanne H. Rayphand
Stanley T. Torres

Defendants:

Miguel M. Sablan
Vicente S. Atalig
George O. Hocog
Maria B. Diaz
Vicente H. Borja
Frances M. Sablan
Ramon A. Tebuteb
Connie Seman-Camacho
Juan M. Diaz

Intervenors:

United States of America
Commonwealth of the Northern Mariana Islands
Eleventh Northern Marianas Commonwealth Legislature
Mayor of Tinian
Mayor of Rota

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DISTRICT COURT OPINIONS AND ORDERS

The district court's memorandum Order Denying Motion to Dissolve Three-Judge Court is included in the Appendix at 18a-24a.

The memorandum decision of the district court on the merits, Order Re: Cross Motions for Summary Judgment and Denying as Moot the Motion for Judgment on the Pleadings, is set forth in the Appendix at 1a-17a.

JURISDICTION

This case was heard by a three-judge district court, convened in accordance with 28 U.S.C. § 2284(a). *See*, App. 18a (Order Denying Motion to Dissolve Three-Judge Court).

The district court had jurisdiction by virtue of 48 U.S.C. § 1822(a), 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. §§ 1343(a)(3) and 1343(a)(4).

The district court's decision on the merits was entered May 5, 1999. No rehearing was sought. A timely notice of appeal was filed May 5, 1999, in accordance with 28 U.S.C. § 2101(a).

This Court has jurisdiction by virtue of 28 U.S.C. § 1253 (direct appeals from three-judge courts).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 203(c) of the Covenant

> (c) The legislative power of the Northern Mariana Islands will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of the bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

U.S. Public Law 94-241, 90 Stat. 263 (Mar. 24, 1976), Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America.

Section 2(a), Constitution of the Northern Mariana Islands

> (a) The senate shall consist of nine members with three members elected at large from each of three senatorial districts. The first senatorial district shall consist of Rota, the second senatorial district shall consist of Tinian and Aguiguan, and the third senatorial district shall consist of Saipan and the island north of it.

1 C.M.C., p. B-303 (Commonwealth Code).

The Territorial Clause

> Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. CONST. art. IV, § 3, cl. 2.

Due Process Clause of the Fifth Amendment

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. V.

The Equal Protection Clause of the Fourteenth Amendment

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

Stanley Torres and Jeanne Rayphand are both citizens of the United States and residents of the Island of Saipan, App. 27a, which is the largest and most populous of the three principal islands which make up the Commonwealth of the Northern Mariana Islands. The other major islands are Rota and Tinian. Tinian, the island from which the *Enola Gay* carried the atomic bomb to Hiroshima, is located just across the channel to the South of Saipan. Rota is some 100 miles further south, just north of the Territory of Guam.

Because Rayphand and Torres live on Saipan, they elect only three senators to the Commonwealth Senate, to represent 38,932 persons, according to the 1990 census. App. 30a. There are nine seats in all in the Commonwealth Senate. App. 4a. The Rota voters elect three senators to represent their island, with a population of 2,295 persons. The remaining three senators are elected by the residents of Tinian, with a population of 2,118. App. 4a-5a.

This arrangement produces the following variations in voting power. The people of Rota, with 5% of the Northern Marianas population, elect one-third of the Senate, App. 5a, giving them a vote with a value 1695% greater than that of a Saipan voter. The people who reside on Tinian elect one-third of the Senate, App. 5a, giving a Tinian vote a 1836% advantage over Saipan. App. 31a.

Conversely, this results in the dilution of the strength of a Saipan ballot by a factor of 17 to 1 in relation to the Rota votes and 18 to 1 as compared with a Tinian ballot. App. 31a.

If the seats of the Commonwealth Senate were filled in nine electoral districts of substantially equal population, the Commonwealth citizens residing on Saipan would be entitled to eight of the nine Senate seats. Rota and Tinian would share one senator. App. 31a-32a.

Given the functions and power of the Commonwealth Senate, this means that the representatives of 10% of the population have what amounts to the absolute power of denial with respect to the following important matters: (1) the passage of legislation of all kinds, (2)

consent to gubernatorial appointments to the eight judicial offices of the Commonwealth courts, (3) consent to gubernatorial appointments to executive branch positions and the governing bodies of independent boards and commissions, (4) the internal organization of the Senate including the election of officers, the making of committee assignments and the allocation of the budget of the Senate among its members and committees. App. 33a and Arts. II, III and IV, Commonwealth Constitution, 1 C.M.C., pp. B-303 to B-319.

This inequitable situation has existed for over 20 years, since the founding of the Commonwealth government in 1978. App. 33a. It will continue to exist, forever, Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands 1-5 (Marianas Political Status Comm. 1975) (the Covenant establishes a "permanent political union" between the United States and the Northern Mariana Islands), unless the decision of the district court is reversed.

THE SUBSTANTIAL QUESTIONS INVOLVED IN THIS APPEAL

I. THE INSULAR CASES DOCTRINE DOES NOT PERMIT THE CONGRESS TO DENY THE RESIDENTS OF SAIPAN EQUAL VOTING RIGHTS

The district court was right to employ the *Insular Cases* doctrine as the rule of decision in this case, but the court did not apply it correctly.

In an *Insular Cases* analysis, the relationship of the United States and the territory under examination is of

crucial importance. The details of the relationship between the Northern Mariana Islands and the United States, extending from World War II and the Trusteeship period to the present are set forth in a number of places. We will refer the Court to a few of the many sources rather than lay it all out here: *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); *Gale v. Andrus*, 643 F.2d 826 (D.C.Cir. 1980); *Commonwealth of the Northern Mariana Islands v. Atalig*, 1 C.R. 552, 559-62 (App.Div.U.S.D.C. 1984), *overruled on other grounds*, 723 F.2d 682 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984); *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684-86 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984); *Wabol v. Villacrusis*, 958 F.2d 1450, 1458-59 (9th Cir. 1990), *cert. denied*, 506 U.S. 1027 (1992); James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 J. INT'L L. & POLICY 35 (1980); Arnold H. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L.J. 19 (1980); Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1442 (1977); Donald F. McHenry, *Micronesia: Trust Betrayed*, pp. 129-69 (1975); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations*, pp. 519-93 (1989); and Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions*, pp. 425-59 (1995).

The parties to the Covenant expressly provided that the Fifth Amendment and the Fourteenth Amendment of

the United States Constitution would apply to the Commonwealth government, "as if the Northern Mariana Islands were one of the several States" "[t]o the extent that they are not applicable of their own force." Covenant, § 501(a). At the same time, the Covenant purports to insulate § 203(c) from constitutional attack under the Fifth or Fourteenth Amendments by providing that their inclusion in subsection (a) "will be without prejudice to the validity of and the power of the Congress of the United States to consent to Section[ ] 203. . . . " Covenant, § 501(b).

For purposes of the *Insular Cases* analysis, we begin with the premise that the Commonwealth is an "unincorporated territory" to which the entire United States Constitution does not apply of its own force. *Examining Board v. Flores de Otero*, 426 U.S. 572, 599 n. 30 (1976) (only " 'fundamental' constitutional rights . . . guaranteed to the inhabitants" of an unincorporated territory); *Wabol*, 958 F.2d at 1459. The difficulty is that the doctrine of territorial incorporation "turns upon a none-too-clear distinction between territories that have and territories that have not been 'incorporated into the Union,' a decidedly murky phrase . . . " Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 873 (1990). And, the *Insular Cases* do not "explain how to distinguish fundamental from non-fundamental constitutional provisions. . . . " *Id.* at 874.

In the case of Puerto Rico, a territory with a status very similar to the Northern Marianas, this Court held in the *Flores de Otero* case that "the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the

Fourteenth Amendment apply to residents of Puerto Rico." *Flores de Otero*, 426 U.S. at 599-601. The *Wabol* court seems to adopt that view as applicable to the Northern Mariana Islands. *Wabol*, 958 F.2d at 1459-60 & n. 19.

The *Wabol* court, following the lead of the Ninth Circuit decision in *Atalig*, defined "fundamental rights" in the context of an *Insular Cases* analysis as " 'those limitations in favor of personal rights' which are 'the basis of all free government.' " *Wabol*, 958 F.2d at 1460. The *Atalig* court took the "basis of all free government" formulation from *Dorr v. United States*, 195 U.S. 138, 146-47 (1904).

Confusing matters further, the *Wabol* court said:

> In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this *international* sense.

Wabol, 958 F.2d at 1460 (emphasis original).

The *Wabol* court seemed to regard the meaning of its phrase "fundamental in this international sense" as self-evident, because it did not explain or amplify it. Since the Commonwealth is "under the sovereignty of the United States," Covenant, § 101, this inquiry does not involve any reference to international law. The Ninth Circuit might have had the following statement of Justice White in mind:

> The result of what has been said is that while in an international sense Porto Rico is not

> a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

Downes v. Bidwell, 182 U.S. 244, 341-42 (1901).

We suggest that the correct view is that what is and is not a "fundamental right" of United States citizens residing in a territory of the United States should be determined by reference to the American legal system and American jurisprudence. It must be decided by this Court, by reference to the United States Constitution.

Is the right to cast a ballot of full value in Commonwealth Senate elections fundamental, and therefore applicable to the Commonwealth? We think that this Court has decided that question.

In its decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court was at pains to explain the importance of equal opportunity at the ballot box. Several passages from the *Reynolds* opinion express the importance this Court saw in the very rights which are at issue here.

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds, 377 U.S. at 555.

> 'The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.'

Reynolds, 377 U.S. at 558 (citations omitted).

> 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.'

Reynolds, 377 U.S. at 560 (citations omitted).

> A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature.

Reynolds, 377 U.S. at 561.

> The impairment of the right to vote 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man,' presenting questions of alleged 'invidious discriminations * * * against groups or types of individuals in violation of the constitution guaranty of just and equal laws.'

Reynolds, 377 U.S. at 561 (citations omitted).

> [T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

Reynolds, 377 U.S. at 560-61.

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S. at 370.

Reynolds, 377 U.S. at 561-62.

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies.

Reynolds, 377 U.S. at 565.

> Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the

> Fourteenth Amendment just as much as invidious discriminations based upon factors such as race.

Reynolds, 377 U.S. at 565-66.

> [T]he democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

Reynolds, 377 U.S. at 566.

The "one person, one vote" principle applies to both houses of a bicameral legislature like that of the Commonwealth. This is the statement of the *Reynolds* Court on that subject:

> We hold that, as a *basic constitutional standard*, the Equal Protection Clause requires that the seats in both houses of a bicameral legislature must be apportioned on a population basis.
>
> Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Reynolds, 377 U.S. at 568 (paragraphing and emphasis added).

In two decisions that preceded the apportionment decision in *Reynolds*, this Court said:

> No right is *more precious in a free country* than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (emphasis added).

In another case, this Court said:

> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.

Gray v. Sanders, 372 U.S. 368, 381 (1963).

In light of these statements, there can be no doubt that this Court regards equal voting rights as fundamental. The right to equal voting rights, as defined by this Court in *Reynolds* and *Wesberry* and *Gray*, surely fits the description of " 'those fundamental limitations in favor of personal rights' which are 'the basis of all free government.' " *Atalig*, 723 F.2d at 690; *Wabol*, 958 F.2d at 1460.

The rhetorical expression "the basis of all free government" surely is a reference to the United States of America, which regards itself as the best example of a free and open government on earth.

Eight years after *Reynolds*, in a case arising in the territorial context, this Court observed that "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982). And, the Court observed:

> To be sure, when a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, 'a citizen has a constitutionally protected right to participate in elections on an

> equal basis with other citizens in the jurisdiction.' *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The application of constitutional limitations to Puerto Rico, an unincorporated territory, is governed by the *Insular Cases* doctrine. *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

The district court apparently thought that if one example of a malapportioned legislature exists anywhere on earth then equal voting rights could not be considered "fundamental" for purposes of the *Insular Cases* doctrine. App. 16a-17a ("Since it is clear that the 'one man, one vote' principle is not a right that is the 'basis of all free government,' it need not be applied in and to an unincorporated territory such as the Commonwealth.").

As proof of the lack of global universality of the one person, one vote requirement, the district court noted that "[s]everal countries that are considered to have 'free government' have a bicameral legislature in which one house is malapportioned. Amongst these is the United States." App. 16a. It did not give the names of these "several countries" and it did not explain why it included the United States where all fifty states and every territory except for the Northern Mariana Islands has a local legislature based on population.

The district court did not mention or discuss the holding of the *Reynolds* court that composition of the United States Senate had such different historical and constitutional antecedents that it was not analogous to the distribution of voting power at the state level. *Reynolds*, 377 U.S. at 571-77.

Professor Tribe describes the importance of equal voting opportunity this way:

> [C]ases involving the right to vote and the right to litigate, share with the first amendment and due process cases . . . a core structural idea that the right at stake is really one to equal participation in governmental and societal decision-making.

Laurence H. Tribe, *American Constitutional Law* 1460 (2d ed. 1988).

If the right to a vote of equal weight in territorial elections is not fundamental for purposes of the *Insular Cases* analysis, then no right is fundamental and any and all personal rights can be denied by the Congress whenever it finds it convenient or expedient to do so.

II. TO REQUIRE THE COMMONWEALTH TO APPORTION ITS SENATE ON THE BASIS OF POPULATION WOULD NOT BE IMPRACTICAL AND ANOMALOUS

The district court decided that consideration of the impact of application of the *Reynolds v. Sims* rule to the Commonwealth was unnecessary because of the decision of this Court in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). App. 14a n. 11. For that reason it discarded what it called the "impractical or [sic] anomalous" test used in *Wabol*.

The *Wabol* court used two tests to determine whether the right to own real property which was "resident in the equal protection clause," *Wabol*, 958 F.2d at 1460, was

"fundamental" and therefore applicable to the Commonwealth. One was the usual examination of that right and its characteristics. *Wabol*, 958 F.2d at 1460-62. The other involved the question whether application of that fundamental right to the Commonwealth would be "impractical and anomalous." *Wabol*, 958 F.2d at 1461-62.

The circuit court did not explain whether these two very different considerations operated independent of one another or whether, for example, the analysis should first determine whether the right is fundamental before going on to examine its probable impact.

This approach was borrowed from *King v. Morton*, 520 F.2d 1140 (D.C.Cir. 1975), a decision in which the court held that it had no jurisdiction and then proceeded to render a lengthy advisory opinion on the subject of the *Insular Cases* doctrine.

In any event, if the *Wabol* court was right to use the "impractical and anomalous" criteria for anticipating the effect of application of a fundamental right to the citizens of a territory like the Commonwealth, *Wabol*, 958 F.2d at 1461, then the district court should have done so here.

In a cogent and scholarly dissent in the Commonwealth Supreme Court case of *Sablan v. Tenorio*, 4 N.Mar.I. 351 (1996), Special Judge Jane Mack argued persuasively that the right to equal voting opportunity in Commonwealth elections was fundamental and that a decision requiring the Commonwealth Senate seats to be apportioned on the basis of population would not be impractical and anomalous.

The *Wabol* "impractical and anomalous" analysis involves a number of factors, only one of which is the question whether the Covenant would have been possible if Rota and Tinian had not been given control of the senate. The major factor is the impact of the right at issue on the "unique social and cultural conditions and values" of the people of the Commonwealth. *Wabol*, 958 F.2d at 1460.

To apportion the Commonwealth senate in the same way that the house seats are apportioned, in a community where virtually every man, woman and school-child is imbued with the fundamental principles of American democracy, would cause no disruption whatsoever, except in the political lives of the Rota and Tinian senators who now have dominant control of the legislature. The social and cultural values which are at stake here are those very democratic values which are deeply held by the people of the Commonwealth. *See*, Covenant, Fourth Preamble ("Whereas, the people of the Northern Mariana Islands and the people of the United States share the goals and values found in the American system of government based on the principles of government by the consent of the governed, individual freedom and democracy; and").

The Northern Mariana Islands began to enjoy a form of democratic government under the Trust Territory regime. Don A. Farrell, *History of the Northern Mariana Islands* 444-613 (Commonwealth Public School System 1991). The people of the Northern Marianas exercised their considerable political skills to obtain separate negotiations with the United States and to ultimately win the Commonwealth they sought. Arnold H. Leibowitz, *The*

Marianas Covenant Negotiations, 4 FORDHAM INT'L L.J. 19 (1980). For years the people of the Commonwealth have enjoyed a political life of the most sophisticated and lively kind. Samuel F. McPhetres, *Self-Government and Citizenship in the Commonwealth of the Northern Mariana Islands* (Commonwealth Public School System 1997).

The level of political sophistication of the people of the Northern Mariana Islands and their leaders can be seen in the debate at the First Constitutional Convention.

At the 1976 Constitutional Convention, Delegate Benjamin T. Manglona of Rota, the very person who led the eleventh-hour move to get Section 203(c), stated that "[t]here can be no progress without justice, and there can be no justice until we recognize that the people of the Northern Marianas are one people." JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 7.

Delegate Henry U. Hofschneider of Tinian, also said, "It pains me to think that at one time our ancestors were one people and then were colonialistically divided by foreign power. . . . " JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 62.

On January 7, 1963, the Charter for the Mariana Islands District Legislature was signed. Charter, Mariana Islands District Legislature (Jan. 7, 1963).

The Mariana Islands District Legislature was apportioned as follows:

> Rota shall have three (3) Representatives; Tinian shall have one (1) Representative; Saipan shall

> have eleven (11) Representatives; the Northern Mariana Islands shall have (1) Representative.

Charter, Mariana Islands District Legislature, art. I § 3 (Jan. 7, 1963).

The Charter for the Mariana Islands District Legislature required that reapportionment take place every five years "on a population basis." Charter, Mariana Islands District Legislature, art. I § 4 (Jan. 7, 1963).

In 1976, the Mariana Island Charter was amended to reapportion the legislature, so that Rota would have three representatives, Tinian would have two (2) representatives, Saipan would have eleven (11) representatives, and the islands north of Saipan would have one (1) representative. District Law 4-149, Mariana Islands District, Trust Territory of the Pacific Islands (Mar. 31, 1976).

Throughout the 1975 Constitutional Convention, concern was expressed for equality under the new Constitution. JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 89, 121-122.

Delegate Francisco T. Palacios, of Saipan, expressed the same concern in these words:

> If, indeed, one-man/one-vote concept is the democratic concept, I feel that in the name of unity and justice, it is not good for the bigger municipality or bigger population to dominate the smaller municipality and smaller population. At the same time we should be careful that the smaller municipality does not dominate the bigger municipality. . . . If the smaller population dominates through the name of equality, then it becomes inequitable and we will have a

> Rhodesia. In Rhodesia the minority dominates the majority.

JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 44.

Chairman Benigno Fitial also expressed concern as follows:

> We are concerned because under it any one municipality could prevent ratification although the voters of that municipality constituted a small percentage of the votes cast by the Commonwealth as a whole.
>
> Denial . . . of the basic principle of majority rule might pose constitutional problems under the Federal Constitution Equal Protection Provision. This is true in light of the important decision of the United States Supreme Court in Reynolds v. Sims, the "one man-one vote" decision.

JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 55.

Delegate Olympio T. Borja said:

> I have seen a lot of references in the news media about so-called "geographical differences" at this Convention. For myself, however, I wonder just what geographic differences are being referred to?
>
> I had always thought when we negotiated the Covenant, we were talking about the Northern Mariana Islands – not the Commonwealth of Rota, the Commonwealth of Tinian and the Commonwealth of Saipan. Mr. President, let us recall that we are drafting neither a Declaration

> of Independence, nor the Constitution of an emerging nation. What we are drafting in point of fact is very similar to that of a State Constitution, with the Covenant and the U.S. Federal Constitution as compelling and practical examples.

JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 88.

After listening to the argument that Tinian was entitled to an extra measure of political power at the expense of Saipanese, Delegate Felipe Atalig of Saipan said, "I want to convey the message and remind them that the two-thirds land of Tinian is not the land of the people of Tinian, but is the land of the Northern Marianas Commonwealth Government." JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 137.

Delegate Ramon G. Villagomez of Saipan expressed these views:

> I think we have reached the point where we cannot come to a further compromise, a further understanding, a further giving away of power. This is it. This is the time to walk out. Let me explain why.
>
> There are three municipalities in the Northern Marianas: 12,000 of the people on the island of Saipan, 1,200 or so on Rota and about 750 in Tinian.
>
> We found out we couldn't have a Covenant if we didn't have a compromise, so we thought we were giving compromises. But instead of compromise, the people of Saipan have given to

these minorities more than they are entitled to. Think about this carefully.

What we have given up to this point to the minorities, is more than they are entitled. There is nothing that the people of Saipan can enact in the way of legislation without the permission of the people of Rota and Tinian. Nothing. Nothing can go through that legislature without the people of Rota and Tinian saying "yes."

There is nothing that the people of Rota can ask Saipan, that the people of Saipan can refuse. Because if Saipan says we refuse to cut down your trees, the people of Rota and Tinian in the senate will say, we refuse to cut down your trees and nothing happens.

Therefore, to ask for more when we have already given more than they are entitled to, the power is not here in Saipan now. The power is in the minority.

The minority is asking for more. What more power can we give? We cannot negotiate anymore and we cannot compromise anymore, because we have given more than we can give. We have given more than we can afford. If you are looking for the time in which we cannot go any further, that time has come. We cannot any longer negotiate or compromise.

JOURNAL OF THE NORTHERN MARIANA ISLANDS CONSTITUTIONAL CONVENTION OF 1976, Vol. I, p. 122 (paragraphing added).

This debate occurred about one year after the Covenant was executed. Many of the people involved in the First Constitutional Convention had been involved in the status negotiations which resulted in the agreement to give Rota and Tinian control of the Senate.

Section 203(c) in its present form was demanded by the Rota and Tinian delegations to the Marianas Political Status Commission on the eve of the signing of the Covenant. Don A. Farrell, *History of the Northern Mariana Islands* 597-98 (Commonwealth Public School System 1991).

The demand for control of the Senate had nothing to do with preserving the culture and values of the people of the two islands. The Rota and Tinian delegates wanted control of the legislature so that they would have a better chance to take a larger share of public appropriations. Mayor of Tinian's Declaration, attached as Exhibit C to the Declaration of Loren A. Sutton (July 6, 1998); Declaration of Bernard V. Hofschneider, attached as Exhibit D to Declaration of Loren A. Sutton (July 6, 1998); Declaration of Benjamin T. Manglona, Mayor Rota, in support of Defendants' and Intervenors' Motion for Summary Judgment, ¶ 7; Declaration of Joannes R. Taimanao in Support of Defendants' and Intervenors' Motion for Summary Judgment, ¶ 7, *Rayphand, etc. v. Sablan, etc.*, Civil Action No. 97-0029, United States District Court for the Northern Mariana Islands.

Since its founding in 1978, the Commonwealth has enjoyed phenomenal economic growth. Commonwealth Office of Planning & Budget, *Economic Development Strategy* (1990). With an annual governmental budget of some $200 million, the Commonwealth, in addition to its full-time legislature, has some 4000 employees, a full-time executive branch, five full-time trial judges with salaries of $126,000 per year, a supreme court with a chief justice at $130,000 per year and two associate justices at salaries of $126,000 per annum. Tinian has a casino gambling

resort; there is a move on Rota to pass a local-option law to allow casino gaming on that island. Saipan has nine beach-front resort hotels and four golf courses. Over 20 garment factories export millions of dollars worth of garments to the United States annually. Rota has one golf course, resort hotel complex and wants more. The character of life in the Commonwealth is indistinguishable from that in Guam, Puerto Rico, the Virgin Islands, or for that matter, Hawaii. The Commonwealth Law Revision Commission is on line. http://cnmilaw.org. The Public Auditor has a web-site http://www.opacnmi.com. The Commonwealth has two major Internet providers: Saipan Datacom, hhtp://saipan.com; and GTE Pacifica, http://mtccnmi.com.

The underlying premise of the *Insular Cases* doctrine is found in this passage from Justice Brown's 98-year old opinion in *Downes v. Bidwell:*

> [N]o construction of the Constitution should be adopted which would prevent Congress from considering each [territorial] case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. . . . If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution

> extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

Downes v. Bidwell, 182 U.S. 244, 286-87 (1901).

The people of the Northern Mariana Islands are not backward, uneducated, unsophisticated aliens unfit for modern democratic institutions founded on the principles of the United States Constitution. The malapportioned Commonwealth Senate is the aberration. It is an anomaly in what is otherwise a representative democracy.

CONCLUSION

American citizens in the fifty states and in the United States territories of Puerto Rico, Guam and the Virgin Islands enjoy the equal voting opportunity guaranteed by the ruling in *Reynolds v. Sims,* 48 U.S.C. § 731d & note (Puerto Rico); 48 U.S.C. § 1423 (Guam); 48 U.S.C. § 1571 (Virgin Islands).

If the district court decision is allowed to stand, the people of the Island of Saipan will be the only citizens under the American Flag who do not enjoy the fundamental right to equal voting opportunity.

This Court should note probable jurisdiction and set this case for briefing and oral argument.

Respectfully submitted,

THEODORE R. MITCHELL
Counsel for Appellants

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JEANNE H. RAYPHAND and STANLEY T. TORRES, Plaintiffs v. MIGUEL M. SABLAN, VICENTE N. ATALIG, GEORGE O. HOCOG, MARIA B. DIAZ, VICENTE H. BORJA, FRANCES M. SABLAN, RAMON A. TEBUTEB and CONNIE SEMAN-CAMACHO, Members, Board of Elections, and JUAN M. DIAZ, Executive, Board of Elections (in their official capacities only), Defendants UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, MAYOR OF ROTA, MAYOR OF TINIAN, and ELEVENTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE, Intervenors	Civil Action No. 97-0029 ORDER RE; CROSS MOTIONS FOR SUMMARY JUDGMENT; and, DENYING AS MOOT THE MOTION FOR JUDGMENT ON THE PLEADINGS (Filed May 5, 1999)

BEFORE: WALLACE,* Senior Circuit Judge; UNPINGCO,** District Judge; and, MUNSON, District Judge

Appearances:

For Plaintiffs:

Theodore R. Mitchell

For All Named Defendants
and Intervenor Commonwealth:

Robert Goldberg
Commonwealth Assistant Attorney General

For Intervenor United States:

Lucinda A. Love
Federal Programs Branch
Civil Division
United States Department of Justice
and
Gregory Baka
Assistant United States Attorney
District of the Northern Mariana Islands

For Intervenor Mayor of Rota:

Thomas G. Bruce

For Intervenor Mayor of Tinian:

Loren A. Sutton

For Commonwealth Legislature:

Stephen C. Woodruff

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* The Honorable J. Clifford Wallace, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

** The Honorable John S. Unpingco, Chief District Judge, District Court of Guam, sitting by designation.

MUNSON, District Judge:

THIS MATTER came before the Court on Friday, October 23, 1998, for hearing of Intervenor Eleventh Northern Marianas Commonwealth Legislature's Motion for Judgment on the Pleadings and Plaintiffs'[1] and Defendants' cross-motions for summary judgment.[2]

Upon consideration of briefs submitted and oral argument, the Court rules as follows: Plaintiffs' Motion for Summary Judgment is DENIED; Defendants' Motion for Summary Judgment is GRANTED; and, Intervenor Eleventh Northern Marianas Commonwealth Legislature's Motion for Judgment on the Pleadings is DENIED as moot.

Factual Background

In 1976, the Northern Mariana Islands entered into political union with the United States. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1801 (1998)) (hereinafter "Covenant").

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[1] At the beginning of this action, Jeanne H. Rayphand was the only named Plaintiff; Stanley Tu [sic]. Torres was added on November 28, 1997.

[2] Intervenor United States moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, for summary judgment. Intervenors the Mayors of Rota and Tinian moved for summary judgment and joined in Defendants' motion. These motions advanced substantially the same positions as Defendants' Motion for Summary Judgment.

The Covenant was approved unanimously by the Mariana Islands District Legislature, by an overwhelming majority vote of the people of the Northern Mariana Islands, and by a joint resolution of the United States Congress. It consists of ten articles setting forth the agreement governing the relationship between the Commonwealth of the Northern Mariana Islands (hereinafter "CNMI") and the United States as its sovereign. *Id.* Article II, § 201 of the Covenant calls for the people of the CNMI to establish and approve a Constitution, and § 203 provides for a republican form of government. Section 203(c) specifies that the legislative power "will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation." Covenant, art. II, § 203(c). Section 203(c) further states:

> The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

In accordance with Covenant § 203(c), the CNMI Constitution provides for a bicameral legislature, composed of a Senate and House of Representatives. N. Mar. I. Const. art. II, §§ 2 and 3. While the composition of the House of Representatives is determined according to the population of the various islands in the Commonwealth, the Senate is composed of "nine members with three members elected at large from each of three senatorial districts." *Id.* § 2(a). Pursuant to Article II, section two of the CNMI Constitution, the first district consists of the

island of Rota, the second of the islands of Tinian and Aguigan, and the third of the island of Saipan and the islands lying north of Saipan. Saipan, Tinian, and Rota are the only islands with significant populations and Saipan's population is between fifteen and twenty times greater than either Tinian's or Rota's. Thus, Rota and Tinian (three senators each) have approximately ten percent of the total CNMI population, while only three Senators represent Saipan, which has approximately ninety percent of the population. *See* U.S. Dept. of Commerce, 1990 Census of Population and Housing; Social, Economic and Housing characteristics, CNMI (Mar. 1992), filed at p. 3 of Pls.' Ex. in Supp. of Mot. for Summ. J. (Aug. 1, 1997).[3] All parties agree that the CNMI Senate is malapportioned.

Plaintiffs challenge § 203(c), asserting that it violates the Equal Protection Clause of the United States Constitution by failing to meet the "one person, one vote" constitutional standard definitively stated in *Reynolds v. Sims*, 377 U.S. 533 (1964).

Procedural Background

On July 8, 1997, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief against the Governor,[4] the CNMI Board of Elections (hereinafter "BOE"), and the

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[3] The 1990 census reported the population of Saipan and the northern islands to be 38,932, Tinian and Aguigan to be 2,118, and Rota to be 2,295. *Id.*

[4] The Complaint named the then current Governor, Froilan C. Tenorio.

Tenth Commonwealth Legislature (hereinafter "Legislature"). The Complaint asserted that the composition of the CNMI Senate violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because of the great disparity in the populations of the three CNMI senatorial districts. (Compl. for Decl. and Inj. Relief, ¶ 1.) This disparity allegedly violates 42 U.S.C. § 1983 and plaintiffs sought an injunction compelling the Governor and the CNMI Legislature to redistrict the Senate into "nine election districts of substantially equal population for the election of the nine senators," (*id.* ¶ 3), and an order of the Court directing that a special election be held for membership in the newly-reapportioned Senate.[5]

After dismissal of the first complaint, the filing of an amended complaint, and many intervening motions which need not be revisited here, Plaintiffs moved for summary judgment. The United States intervened as of right pursuant to 28 U.S.C. § 2403(a). In addition, the CNMI, the Legislature, the Mayor of Rota, and the Mayor of Tinian moved to intervene, which motions the Court granted on May 8, 1998. Thereafter, Defendants moved for summary judgment; the United States moved to dismiss or, alternatively, for summary judgment; the Mayors of Rota and Tinian each moved for summary judgment; and, the Legislature moved for judgment on the pleadings.

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[5] Also, on August 15, 1997, Plaintiffs requested the convocation of a three-judge court pursuant to 28 U.S.C. § 2284. That motion is the subject of a separate order.

On Friday, October 23, 1998, the Court heard oral argument on these motions, and now rules as follows:

The Constitutionality of the Malapportioned Senate

Plaintiffs assert that they are entitled to a judgment as a matter of law declaring that the composition of the CNMI Senate – which gives three senators each to the islands of Saipan, Rota and Tinian – violates the Fourteenth Amendment right of every citizen of Saipan to the equal protection of the law because the large disparity between the population of Saipan, on the one hand, and the populations of Rota and Tinian on the other, greatly dilutes the voting power of Saipan voters. Plaintiffs seek a declaration to that effect and an injunction directing the BOE to conduct a special election to elect a new Senate which is apportioned according to the population distribution of the CNMI.

Conversely, Defendants and Intervenor CNMI move for summary judgment on the grounds that (1) every court in the CNMI has previously rejected this "Covenant challenge;"[6] (2) equal representation in the Senate was an

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[6] The Court declines to address again Defendants' recurrent argument that this court must either give *stare decisis* effect to, or decline to re-visit for prudential reasons, a previous decision of this court in *Hillblom v. United States*, 3 N.Mar.Commonw.Rptr. 294 (D.N.Mar.I. 1988) (Laureta, C.J.)

Defendants also urge the Court to reject Plaintiffs' "Covenant challenge" because they contend that the CNMI Superior and Supreme Courts have previously rejected the identical challenge to Covenant § 203(c) in *Sablan v. Tenorio*, Civ. Act. No. 94-500 (N. Mar. Commonw. Super. Ct. July 18, 1994), at

essential "compromise and concession" in the formation of the Commonwealth; (3) the Covenant case law supports a finding that unequal representation in the CNMI Senate is constitutional; and (4) an adverse ruling would be catastrophic to the future of the Commonwealth. Intervenors Mayor of Tinian and Mayor of Rota join in the motion. Intervenor United States moves for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), or, alternatively, for summary judgment on the basis that the composition of the CNMI Senate does not violate the equal protection guarantee of the Fourteenth Amendment because the "one person, one vote" standard is not a fundamental right within unincorporated territories under the Insular Cases Doctrine and Ninth Circuit law.

We conclude that the argument advanced by Intervenor United States is legally correct for the following reasons.

Defendants and Intervenors concede that the Senate, as currently composed, is malapportioned. With that in mind, the issue we must confront may be fairly stated as follows:

> Did the United States Congress have the power to concede to the demand in 1975 of the negotiators for the Northern Mariana Islands, which islands were not at that time a United States territory or possession, that the fundamental

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19-30, *affirmed*, Appeal No. 94-034 (N.M.I. Apr. 18, 1996). This Court disapproved the same argument when advanced by the Legislature in an earlier motion to dismiss, (*See* Order Den. Def. Legislature's Mot. to Dismiss, Oct. 20, 1997.), and does so again today.

United States constitutional guarantee of "one person, one vote" would not apply with regard to the composition of the Northern Mariana Islands Senate, when as a result of the negotiations the NMI became a commonwealth in political union with, and under the sovereignty of, the United States, and whose people became full United States citizens in 1986?

Defendants first contend that without the express condition of equal representation in the Senate, the islands of Rota and Tinian would not have agreed to join the union with Saipan.[7] Thus, argue Defendants, the CNMI's population-based lower house and geography-

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[7] *See e.g.* Marianas Political Status Commission, "section-by-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands (1975), ***reprinted in Hearing to Approve The Covenant to Establish a Commonwealth of the Northern Mariana Islands: Hearings on H.R.J.Res. 549 Before the Sub-comm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs,*** 94th Cong., 1st Sess. 626-65 (1975) ("The establishment of the commonwealth involves compromises and concessions which reflect the different historical and geographic interests of the major islands in the Northern Mariana group, as well as population. * * * The Commission concluded that, in light of the past experience of the people of Rota and Tinian and the need for their support of the Covenant, the protection afforded them by Section 203(c) was entirely appropriate and desirable.") and in ***Northern Mariana Islands: Hearing Before the Senate Comm. on Interior and Insular Affairs,*** 94th Cong., 1st Sess. 356-496 (1975); Senate Comm. on Interior and Insular Affairs, Section-by-Section Analysis of the Covenant, S.Rep. No. 433, 94th Cong., 1st Sess. pp. 65-94 (1975) ("This provision was inserted at the insistence of the chartered municipalities of Rota and Tinian with the unanimous support of the Marianas Political Status Commission.").

based upper house is exactly analogous to the United States Congress and should therefore survive constitutional scrutiny under *Reynolds v. Sims*, 377 U.S. 533, 574 (1964), as did the federal bicameral legislature.

We need not discuss this issue, because resort to the federal analogy may be misleading when discussing the Commonwealth, which exists "under the sovereignty of the United States of America," Covenant § 101, and because we dispose of this case on other grounds. Because there is no question that the CNMI Senate is malapportioned, the question before us is whether this arrangement is constitutional in the Commonwealth in the face of the "one man, one vote" requirement imposed on the states by *Reynolds v. Sims*. Our answer is compelled by two previous decisions involving the Covenant: *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984), and *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992).

In *Atalig*, the defendant had been convicted in a CNMI trial court of possession of marijuana in violation of a local statute. 723 F.2d at 684. Because CNMI law only provides the right to a jury in a criminal case for offenses punishable by more than five years imprisonment or a $2,000 fine, *see* 5 Trust Territory Code § 501(1) (now codified as 7 N.Mar.I. Code § 3101), and because Atalig's charge only involved a maximum penalty of one year in prison, a $1000 fine, or both, Atalig did not receive a jury trial. *Id.* The Appellate Division of the District Court for the Northern Mariana Islands, which at that time served as the intermediate court of appeal between the then Commonwealth Trial Court and the U.S. Court of Appeals for the Ninth Circuit, reversed the conviction,

holding that Atalig was denied his right to trial by jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Id.* The court also held that Covenant § 501[8] and the local statutory provision limiting the right to a criminal jury trial were unconstitutional to the extent they denied the right to a jury trial. *Id.* The Ninth Circuit, faced with the issue of whether the limitation on trial by jury violated the Constitution notwithstanding the Covenant, reversed the Appellate Division, based upon the holdings of the *Insular Cases*.[9] *Id.* at

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[8] Covenant section 501 provides in relevant part:

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several states . . . Amendments 1 through 9, inclusive; . . . Amendment 14, Section 1; . . . provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law.

Covenant, § 501(a). Section 501(b) authorizes Congress to approve section 501(a).

[9] The *Insular Cases* are a line of Supreme Court decisions concerning the doctrine of territorial incorporation. They are generally deemed to include *Balzac v. Porto [sic] Rico*, 258 U.S. 298 (1922) (constitutional right to jury trial does not apply to territories not incorporated into the United States; neither Puerto Rico Organic Act nor organization of United States District Court served to incorporate Puerto Rico into United States); *Rasmussen v. United States*, 197 U.S. 516 (1905) (Alaska so incorporated into United States by the treaty under which it was acquired, and by subsequent federal legislation made applicable to Alaska, that 6th Amendment right to jury trial applied to territory); *Dorr v. United States*, 195 U.S. 138 (1904)

688-690. The *Insular Cases* held, among other things, that the right to a jury trial as guaranteed by the Sixth Amendment and the right to grand jury indictment as guaranteed by the Fifth Amendment to the United States Constitution are not "fundamental rights," and they do not apply automatically in unincorporated territories.[10] *Id.* at 688. The *Atalig* court found that the Appellate Division had incorrectly relied upon *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that the right to a criminal jury trial in state prosecution for serious criminal offenses is a fundamental right incorporated by the Fourteenth Amendment Due Process Clause. *Id.* at 689. The court stated that the Appellate Division had assumed that this "fundamental right" applied in unincorporated territories, but that *Duncan* could be read only as adopting a new definition of fundamental rights for the purpose of applying the Bill of Rights to the states. *Id.* The court

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(the right to jury trial was not extended by the Federal Constitution, without legislation, and of its own force, to the Philippines, because they were not incorporated by congressional action); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (constitutional right to grand and petit juries not extended to Hawaiian Islands by their annexation); *Downes v. Bidwell*, 182 U.S 244 (1901) (revenue clauses of the Constitution are inapplicable to Puerto Rico); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901) (goods imported into Puerto Rico from United States after cession of Puerto Rico by United States are not subject to duties because, after cession, Puerto Rico no longer a foreign county [sic]); *DeLima v. Bidwell*, 182 U.S. 1 (1901) (Puerto Rico is not a foreign country and import duties levied on sugar were illegal).

[10] It is undisputed that the CNMI is not an incorporated territory, although its exact status is far from clear. *Wabol v. Villacrusis*, 958 F.2d at 1460 n.18; *Atalig*, 723 F.2d at 691 and n.28.

further explained that the purpose of the doctrine of territorial incorporation is "to limit the power of Congress to administer territories under Article IV of the Constitution." *Id.* The court then turned to the method of identifying "fundamental rights" for purposes of territorial incorporation as set forth in the *Insular Cases* and instructed courts grappling with the issue to consider "whether the asserted right was one of 'those fundamental limitations in favor of personal rights' which are 'the basis of all free government.' " *Id.* at 690 (quoting *Dorr v. United States*, 195 U.S. 138, 146-147 (1904)). The court explained that, by this method, Congress was given the most flexibility in fulfilling its mandate under the Territorial Clause, and the imposition of unfamiliar and possibly unwanted rules on territorial cultures would be avoided. *Id.* The court concluded that Covenant § 501 and the local law limitation on right to a criminal jury trial were not unconstitutional. *Id.*

Wabol involved an equal protection challenge to the land alienation restriction contained in Article XII of the CNMI Constitution, which implements Covenant § 805. Section 805 allows the CNMI to regulate the alienation of permanent and long-term interests in real property (now defined as interests in excess of 55 years) so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent. The court held that Article XII was not susceptible to an equal protection attack because the right of access to long-term interests in NMI land, resident in the equal protection clause, is not a "fundamental right in the international sense," i.e., rights that are "the basis of all free government." *Wabol*, 958 F.2d at 1460. Therefore, the right did not apply *ex proprio vigore* to

the CNMI.[11] *Wabol*, 958 F.2d at 1462. Thus, the Ninth Circuit concluded that Congress had acted within its power in enacting sections 501(b) and 805 of the Covenant.[12] *Id.*

With the foregoing precedents in mind, we turn to the issue before the Court: did Congress exceed its authority under the Territorial Clause[13] by insulating section 203(c) from the reach of the Equal Protection Clause? We conclude that Congress' endorsement of the NMI negotiators' request that the voters of Saipan be denied

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[11] While *Wabol* also stated that the court should consider whether the application of the right in the territorial context would be "impractical or anomalous," 958 F.2d at 1461, the vitality of that test is in doubt. This language came to *Wabol* from a concurring opinion of Justice Harlan in *Reid v. Covert*, 354 U.S. 1, 17 (1957), via the District of Columbia Circuit decision in *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975). *Wabol*, 958 F.2d at 1461. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), however, the Court stated the central holding of the *Insular Cases* as, "Only 'fundamental' constitutional rights are guaranteed to inhabitants of [unincorporated] territories." *Id.* at 268. Only Justice Kennedy, in a concurring opinion, cited the "impractical or anomalous" test. *Id.* at 278. Given this, we focus on the central test of *Atalig*, *Wabol*, and the *Insular Cases*, which is whether the given right is "the basis of all free government."

[12] Section 501(b) of the Covenant provides "the applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805. . . . "

[13] The Territorial Clause of the United States Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const, art. IV, § 3, cl. 2.

the fundamental United States constitutional guarantee of "one person-one vote" in regards to the composition of the CNMI Senate does not offend the United States Constitution.

As mentioned above, the *Insular Cases* have long provided the legal framework and justification for allowing otherwise unconstitutional practices to continue in United States territories.[14] The primary legal doctrine arising from those cases is that the extent to which a territory's inhabitants are entitled to the protections afforded by the U.S. Constitution is dependent upon the degree to which the territory has been "incorporated" into the United States.[15] Despite the fact that the

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[14] Their vitality is but little diminished almost a century later. *See e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 268, 110 S.Ct. 1056 (1990) (stating that the *Insular Cases* hold that not every constitutional provision applies to governmental activity even where the United States has sovereign power).

[15] The doctrine of incorporated and unincorporated Territories was created in the *Insular Cases*. In the former category were those Territories destined for statehood from the time of their acquisition, and the Constitution was applied to them with full force. In the latter category were those Territories with no anticipation of statehood. As to them, only "fundamental" constitutional rights were guaranteed the inhabitants. *See* James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 Denv. J. Int'l L. & Pol'y 35, 41-46 (1980).

> The immediate issue in *Downes* was whether Congress could impose a tariff on goods imported form Puerto Rico despite the constitutional requirement that all duties be uniform throughout the United States. The Court held that Puerto Rico was

Commonwealth exists "in political union with and under the sovereignty of the United States," Covenant § 101, it has never been "incorporated" into the United States, even though § 101 is a fundamental aspect of the relationship that cannot be changed without the consent of both parties. Covenant § 105.

Given that the CNMI is not an incorporated territory, *Atalig* and *Wabol* require us to determine whether the "one man, one vote" requirement applicable to the states by *Reynolds* is a right that is "the basis of all free government." It is apparent that it is not. Several countries that are considered to have "free government" have a bicameral legislature in which one house is malapportioned. Amongst these is the United States. Since it is clear that the "one man, one vote" principle is not a right that is the

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> not in the full sense 'domestic territory' and that the tariff was valid. The supporting reasoning was supplied in a concurring opinion by Justice White. White (sic) distinguished between 'incorporated' and 'unincorporated' territories. A territory could become incorporated only through the express or implied consent of Congress. Once incorporated, the Constitution fully applied to it. However, in unincorporated territories only certain fundamental provisions of the Constitution applied, such as the prohibitions in favor of the liberty and property of the citizen. But constitutional restrictions that only relate to the 'form and manner' of exercising power, such as the imposition of tariffs, do not apply. Congress may exercise its discretion in such matters, regardless of the language of the Constitution.

Paul M. Leary, *The Northern Marianas Covenant and American Territorial Relations*, Inst. of Governmental Studies, Research Report 80-1, Univ. of Cal. Berkeley (1980).

"basis of all free government," it need not be applied in and to an unincorporated territory such as the Commonwealth. Therefore, we conclude that Congress was exercising valid and lawful authority when it agreed to the NMI negotiators' demand that § 203(c) be included in the Covenant and that the voters of Saipan be denied the guarantee, which would be deemed fundamental under the United States Constitution when applied to a state, of "one person, one vote." Covenant § 203(c) is not unconstitutional. Accordingly, Defendants' motion for summary judgment is GRANTED and Plaintiffs' motion for summary judgment is DENIED. Additionally, because this ruling is dispositive of the case, the Court DENIES as moot Intervenor Legislature's Motion for Judgment on the Pleadings.

IT IS SO ORDERED.

Dated this 5th day of May, 1999.

/s/ J. Clifford Wallace
J. Clifford Wallace
Senior Circuit Judge

/s/ John S. Unpincgo
John S. Unpincgo
District Judge

/s/ Alex R. Munson
Alex R. Munson
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JEANNE H. RAYPHAND and STANLEY T. TORRES, Plaintiffs v. MIGUEL M. SABLAN, VICENTE N. ATALIG, GEORGE O. HOCOG, MARIA B. DIAZ, VICENTE H. BORJA, FRANCES M. SABLAN, RAMON A. TEBUTEB and CONNIE SEMAN-CAMACHO, Members, Board of Elections, and JUAN M. DIAZ, Executive Director, Board of Elections (in their official capacity only), Defendants UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, MAYOR OF ROTA, MAYOR OF TINIAN, and ELEVENTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE, Intervenors	Civil Action No. 97-0029 ORDER DENYING MOTION TO DISSOLVE THREE-JUDGE COURT (Filed May 5, 1999)

BEFORE: WALLACE,* Senior Circuit Judge; UNPINGCO,** District Judge; and, MUNSON, District Judge

MUNSON, District Judge:

This matter came before the Court on Friday, October 23, 1998, for hearing of Defendants' Motion to Dissolve the Three-Judge Court. Plaintiffs[1] appeared personally and by and through their counsel, Theodore R. Mitchell. All named Defendants and Intervenor Commonwealth of the Northern Mariana Islands ("CNMI") appeared by and through their counsel, Assistant Attorney General Robert Goldberg.

Upon consideration of briefs submitted and oral argument, the Court rules as follows:

Early in this matter Plaintiffs requested the convocation of a three-judge court pursuant to 28 U.S.C. § 2284. Defendants moved to dissolve the three-judge court, contending that it lacks subject matter jurisdiction because Plaintiffs are actually challenging the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (Covenant)

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* The Honorable J. Clifford Wallace, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

** The Honorable John S. Unpingco, Chief District Judge, District Court of Guam, sitting by designation.

[1] At the beginning of this action, Jeanne H. Rayphand was the only named Plaintiff; Stanley H. Torres was added on November 28, 1997. In the interests of simplicity and consistency, Plaintiffs will be referred to in the plural throughout this decision.

§ 203(c), which provides for a malapportioned Senate in the Commonwealth,[2] and not the constitutionality of the Senate's apportionment. This distinction, if the court accepts it, would result in removing this lawsuit from the reach of 28 U.S.C. § 2284.

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[2] Covenant, art. II, § 203(c) states:

> The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

In accordance with Covenant § 203(c), the CNMI Constitution provides for a bicameral legislature, composed of a Senate and House of Representatives. N. Mar. I. Const. art. II, §§ 2 and 3. While the composition of the House of Representatives is determined according to the population of the various islands in the Commonwealth, the Senate is composed of "nine members with three members elected at large from each of three senatorial districts." Id. § 2(a). Pursuant to Article II, section two of the CNMI Constitution, the first district consists of the island of Rota, the second of the islands of Tinian and Aguigan, and the third of the island of Saipan and the islands lying north of Saipan. Saipan, Tinian, and Rota are the only islands with significant populations and Saipan's population is between fifteen and twenty times greater than either Tinian's or Rota's. Thus, Rota and Tinian (three senators each) have approximately ten percent of the total CNMI population, while only three Senators represent Saipan, which has approximately ninety percent of the population. *See* U.S. Dept. of Commerce, 1990 Census of Population and Housing; Social Economic and Housing Characteristics, CNMI (Mar. 1992), filed at p. 3 of Pls.' Ex. in Supp. of Mot. for Summ. J. (Aug. 1, 1997).

Conversely, while Plaintiffs agree that the lawsuit involves a provision of the Covenant, the ultimate remedy sought by them is a declaration that the current apportionment scheme is unconstitutional, and a resulting reapportionment of the Senate, and thus they assert the lawsuit falls within the ambit of § 2284. We conclude that Plaintiffs' position the more persuasive for the following reasons.

Title 28 U.S.C. § 2284 provides for a three-judge district court in the following circumstances:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.[3]

Thus, a three-judge court shall be convened when it is necessary to determine whether a challenged federal or state legislative apportionment scheme produces elected representation sufficiently approximating the "one person, one vote" constitutional standard required by *Reynolds v. Sims*, 377 U.S. 533 (1964).

The First Amended Complaint alleges that the malapportioned Senate violates the United States Constitution's Fourteenth Amendment Equal Protection Clause by denying Plaintiffs' voting rights, (First Amended Compl.

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[3] Federal laws are applicable to the Commonwealth if they are also applicable to the several states. Covenant, art. I, § 105; *U.S. ex rel. Richards v. De Leon Duerrero*, 4 F.3d 749, 754 (9th Cir. 1993).

¶ 49), and seeks a declaration stating that such composition is unconstitutional. Plaintiffs specifically challenge on equal protection grounds the constitutionality of the Commonwealth Senate's non-population-based composition, arguing that the disparity in the populations of the three senatorial districts must be reflected in the numerical composition of the Senate.

We determine whether a three-judge court is properly convened based on the issues raised in the complaint. *Ohio ex rel. Williams v. Lambros*, 512 F.2d 372, 373-74 (6th Cir. 1975); *see also Sorosky v. Burroughs Corp.*, 826 F.2d 794, 799 (9th Cir. 1987) (holding that federal jurisdiction is based on whether the plaintiff's well-pleaded complaint raises issues of federal law). The First Amended Complaint alleges that "[t]he apportionment of the Commonwealth Senate violates the rights of the residents of the Saipan senatorial district to equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States, in that it denies them full and effective participation in the political processes of the legislature of the Commonwealth of the Northern Mariana Islands to which he [sic] is entitled." (First Amended Compl. ¶ 36.) It also alleges that Defendants have administered and continue to administer the CNMI senatorial elections in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. (*Id.* ¶ 46.) While Plaintiffs additionally allege that Covenant § 203(c) and CNMI Constitution Article II, § 2(a) violate the Fourteenth Amendment, (*Id.* ¶ 37), it is clear from the First Amended Complaint that they are primarily challenging the constitutionality of the apportionment of the CNMI Senate. Thus, this is not, as

asserted by Defendants, actually a "Covenant case" more appropriate for resolution in § 902 talks.[4]

Additionally, Plaintiffs seek an injunction directing the Commonwealth Board of Elections to conduct a special election for the Senate according to a scheme whereby eight senators will be elected from the Third Senatorial District and one senator will be elected by the combined votes of the First and Second Senatorial Districts. While this Court's decision on the merits may involve analysis of certain Covenant sections in addition to the United States Constitution, that alone does not make this a "Covenant case," as opposed to a constitutional challenge. We are convinced that the First Amended Complaint sufficiently raises issues within the jurisdiction of the three-judge court. *See Lambros*, 512 F.2d at 373-74 (holding that validity of redistricting plan was within the jurisdiction of three-judge court even though the issue turned in part on state law). For that reason, we conclude that review of this matter by a three-judge court pursuant to 28 U.S.C. § 2284 is appropriate, and,

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[4] Covenant § 902 provides for regular consultations between the United States and the Commonwealth "on all matters affecting the relationship between them."

accordingly, Defendants' motion to dissolve the three-judge court is DENIED.

IT IS SO ORDERED.

Dated this 5th day of May, 1999.

/s/ J. Clifford Wallace
J. Clifford Wallace
Senior Circuit Judge

/s/ John S. Unpincgo
John S. Unpincgo
District Judge

/s/ Alex R. Munson
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**IN THE UNITED STATES DISTRICT COURT
FOR THE COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS**

JEANNE H. RAYPHAND and
STANLEY T. TORRES,

Plaintiffs,

v. Civil Action 97-0029

MIGUEL M. SABLAN, VICENTE S. ATALIG, GEORGE O. HOCOG, MARIA B. DIAZ, VICENTE H. BORJA, FRANCES M. SABLAN, RAMON A. TEBUTEB and CONNIE SEMAN-CAMACHO, Members of the BOARD OF ELECTIONS, and JUAN M. DIAZ, Executive Director of the BOARD OF ELECTIONS,

Defendants.

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

(Filed Jan. 15, 1998)

The plaintiffs allege as follows:

INTRODUCTION

1. This is an action seeking a declaratory judgment that the composition of the Senate of the Eleventh Legislature of the Commonwealth of the Northern Mariana Islands denies the electors of Saipan and the Northern Islands equal protection of the law, as guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

2. The Commonwealth Senate is malapportioned because each of the islands of Saipan, Tinian and Rota are allotted three senators despite the great disparity in the population of the three islands.

3. The last general election was held in November 1997.

4. Despite the pendency of this lawsuit at the time of the last general election, no agency or official of the Commonwealth government took steps to remedy the unconstitutional nature of the composition of the Senate.

5. To remedy the discrimination which is inherent in the present composition of the Eleventh Commonwealth Senate, the plaintiffs seek (1) a declaration that the present composition of the Eleventh Senate is violative of the Equal Protection Clause; and (2) an injunction directed to the members of the Board of Elections, and the executive director of the Board, in their official capacity, to conduct a special election, on a date certain to elect the members of a new Commonwealth senate which is apportioned according to the population distribution of the commonwealth.

6. Based on the distribution of the Commonwealth population shown in the 1990 official census, this court should decree that (1) eight senators shall be elected, at large, by the electors in the Third Senatorial District, which includes Saipan and the Northern Islands, and (2) one senator shall be elected by the electors who reside in the First and Second Senatorial Districts, which consist of the Island of Rota and the Island of Tinian, respectively.

7. The denial of the right of the residents of the Island of Saipan to full and effective participation in the political processes of the Commonwealth has existed for the past 20 years, resulting in serious irreparable harm to the plaintiffs and all other residents of the Island of Saipan.

8. Accordingly, it is equitable for this court to immediately remedy this injustice by declaring the Eleventh Commonwealth Senate to be illegally constituted and by ordering that a special election be held without delay, taking into consideration only the time necessary for the filing of nominating petitions in accordance with the Commonwealth Election Code.

THE PARTIES

9. Plaintiffs Jeanne H. Rayphand and Stanley T. Torres are citizens of the United States and the Commonwealth and they are residents of the Island of Saipan, Northern Mariana Islands.

10. Defendant Miguel M. Sablan is a member and the chair of the Commonwealth Board of Elections, which is empowered to administer and supervise all regular,

general and other commonwealth elections, by virtue of 1 C.M.C. § 6104. Sablan is sued in his official capacity as a member of the Board of Elections.

11. Defendants Vicente S. Atalig, George O. Hocog, Maria B. Diaz, Vicente H. Borja, Frances M. Sablan, Ramon A. Tebuteb and Connie Seman-Camacho are members of the Board of Elections; they are sued in their official capacity as members of the Board of Elections.

12. Defendant Juan M. Diaz is the Executive Director ofthe [sic] Board of Elections; he is sued in his official capacity as executive director of the Board of Elections.

13. Defendants Sablan, Atalig, Hocog, Diaz, Borja, Sablan, Tebuteb and Seman-Camacho constitute the entire membership of the Board of Elections.

JURISDICTION

14. This court has jurisdiction of this action by virtue of Article IV § 402(a) of the COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA, 48 U.S.C. § 1822(a), 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1343(a)(4).

EQUITY AND RELIEF

15. This court has the power to entertain suits in equity and pursuant to 28 U.S.C. § 2201 it has the power to issue a declaratory judgment.

16. It is impracticable if not impossible to compensate the plaintiffs in money damages for the violation of their civil rights in this case.

THE EQUAL PROTECTION FACTUAL ALLEGATIONS

The Senatorial Districts

17. By virtue of the Covenant, § 203(c) and Article II, § 2(a) of the Commonwealth Constitution, the Commonwealth is divided into three senatorial districts.

18. The third senatorial election district consists of the island of Saipan and all of the islands situated north of Saipan [hereinafter sometimes referred to as Saipan district].

19. The second senatorial election district consists of the islands of Tinian and Aguiguan [hereinafter sometimes referred to as Tinian district].

20. The first senatorial election district consists of the island of Rota.

Three Senators Per District

21. Each of the senatorial election districts referred to in paragraphs 18 through 20, above, is allotted three seats in the Commonwealth Senate, without regard to the population distribution among the three districts, by virtue of Article II, § 2(a) of the Commonwealth Constitution.

Population Distribution in the Commonwealth

22. In 1990, according to the United States Census, the Saipan senatorial district had a population of 38,896 persons residing on Saipan and 36 persons residing on the northern islands, for a total population of 38,932.

23. In 1990, according to the United States Census, the Tinian senatorial district had a population of 2,118 persons.

24. In 1990, according to the United States Census, the Island of Rota had a population of 2,295 persons.

25. According to the United States Census, the total population of the Commonwealth of the Northern Mariana Islands in 1990 was 43,345 persons.

Disproportionality of Representation

26. The 1990 population of the Saipan senatorial district is about 90% of the total population of the Commonwealth.

27. The 1990 population of the Tinian senatorial district is about 5% of the total Commonwealth population.

28. The 1990 population of the Rota is about 5% of the total population of the Commonwealth.

29. Despite the great disparity in the population of the three senatorial election districts, the persons residing on these districts are given the same representation in the Commonwealth Senate.

Dilution of Saipan Voting Power

30. Because of the malapportionment of the three senatorial election districts, the voting power of the people of Saipan is diluted by a factor of about 18 to 1 in relation to the persons residing on Tinian and it is diluted by a factor of about 17 to 1 in relation to the residents of Rota.

31. In other words, a Commonwealth citizen who happens to reside on the Tinian has about 18 times the voting power of a Commonwealth citizen who resides on Saipan and a Commonwealth citizen who resides on Rota has about 17 times the voting power of a Commonwealth citizen who resides on Saipan.

32. The existing apportionment of the nine senate seats results in a grossly unfair weighing of the membership of the Commonwealth Senate in favor of the lesser populated districts of Tinian and Rota.

Variation in Election District Population

33. Based on the population figures set forth in paragraphs 22 through 25, above, the population of the Tinian senatorial election district varies from the population of Saipan by 1836%.

34. Based on the population figures set forth above in paragraphs 22 through 25, the population of the Rota senatorial election district varies from the population of Saipan district by 1695%.

35. If the Commonwealth senators were elected in nine electoral districts of substantially equal population, the residents of the Saipan senatorial district would be

allotted 8 Senate seats and the Islands of Rota and Tinian would be combined into a single senatorial district which would be allotted 1 Senate seat.

The Senate Composition Violates Federal Law

36. The apportionment of the Commonwealth Senate violates the rights of the residents of the Saipan senatorial district to equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States, in that it denies them full and effective participation in the political process of the Legislature of the Commonwealth of the Northern Mariana Islands to which he is entitled.

37. Section 203(c) of the Covenant and Article II, § 2(a) of the Commonwealth Constitution are violative of the Fourteenth Amendment of the Constitution of the United States of America for the reasons stated above.

Malapportionment Since 1978

38. The malapportionment of the Commonwealth Senate set forth above has existed since 1978 and during the intervening 20 years, the people residing on the Island of Saipan and in the northern islands have been deprived of their inalienable right to full and effective participation in the political processes of the Commonwealth Senate and, thereby, in the political processes of the Legislature as a whole.

Dire Consequences of the Malapportioned Senate

39. The Commonwealth Senate exercises the power of advice and consent over gubernatorial appointments to all key executive offices, to all judicial offices and to numerous boards, agencies and commissions.

40. By virtue of Article II, § 5(c) of the Commonwealth Constitution, concurrence of a majority of members of the Commonwealth Senate is required for the passage of all legislation.

41. Because of the present composition of the Senate, the legislative power vested in the Commonwealth Senate is subject to the will of the six members of the Senate who represent a mere 10% of the population of the Commonwealth.

42. In addition to the exercise of legislative power to enact legislation and to give or withhold consent to gubernatorial appointments, the internal organization of the Senate is controlled by the six senators from Rota and Tinian, including the election of officers, committee assignments and the allocation of the budget of the Senate among its members and committees.

43. The present state of affairs results in serious, immediate, continuous irreparable harm to the plaintiffs.

Remedy Long Overdue

44. The malapportionment of the Commonwealth Senate has existed since the founding of the Commonwealth in 1978, some 20 years ago.

45. The time to remedy this gross inequity is long overdue and as a consequence, it is just and equitable for this court to declare the present composition of the Senate of the Eleventh Commonwealth Legislature to be unconstitutional and to order the immediate holding of a special election to be held in conformity with a redistricting and reapportionment plan which is decreed by this court.

The Defendants Have Failed to Act

46. Despite the fact that the Board of Elections was made a party to this suit at the outset, the defendant members and executive director of the Board, acting under color of Commonwealth law, have continued to administer the Commonwealth senatorial elections in an illegal manner, in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and they persist in their illegal conduct to the present time.

Civil Rights Act

47. This action is brought pursuant to and on the basis of the United States Civil Rights Act, 42 U.S.C. § 1983.

Fee Award

48. If the plaintiffs prevail in this action, on their equal protection claim, then they are entitled to an award of reasonable attorneys' fees and costs, pursuant to 42 U.S.C. § 1988.

PLAINTIFFS' CAUSE OF ACTION

49. For the reasons stated in paragraph 15 through 46, the defendants, acting under color of Commonwealth law, have denied the plaintiffs of their voting rights, because the present composition of the Senate is violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America.

50. Because of the illegal conduct described in paragraph 49, above, the plaintiffs are entitled to declaratory and injunctive relief.

PRAYER

WHEREFORE, plaintiffs pray for a declaratory judgment and injunctive relief against the defendants as follows:

1. A judgment declaring the Senate of the Eleventh Commonwealth Legislature to be constituted in a manner which is violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. An affirmative injunction commanding the defendant members and executive director of the Board of Elections, in their official capacity, to conduct and administer a special election, by a date certain, which provides that: (1) eight senators shall be elected, at large, by the electors in the Third Senatorial District and (2) one senator shall be elected by all of the electors who reside in the First and Second Senatorial Districts.

3. An award to the plaintiffs for reasonable attorney's fees and costs incurred in connection with the prosecution of their equal protection claim pursuant to 28 U.S.C. § 1988.

4. Such other and further relief as the Court deems just and proper.

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/s/ T.R. Mitchell

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**IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS**

JEANNE H. RAYPHAND and
STANLEY T. TORRES,

Plaintiffs,

v.

MIGUEL M. SABLAN, VICENTE S. ATALIG, GEORGE O. HOCOG, MARIA B. DIAZ, VICENTE H. BORJA, FRANCES M. SABLAN, RAMON A. TEBUTER and CONNIE SEMAN-CAMACHO, Members of the BOARD OF ELECTIONS, and JUAN M. DIAZ, Executive Director of the BOARD OF ELECTIONS,

Defendants,

UNITED STATES OF AMERICA; COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS; ELEVENTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE; MAYOR OF TINIAN; and MAYOR OF ROTA,

Intervenors.

**Civil Action
97-0029**

**NOTICE OF
APPEAL**

(Filed
May 5, 1999)

NOTICE OF APPEAL
TO THE
UNITED STATES SUPREME COURT

TO THE CLERK OF THE DISTRICT COURT:

NOTICE IS HEREBY GIVEN THAT plaintiffs Jeanne H. Rayphand and Stanley T. Torres appeal to the United States Supreme Court from the order of the United States District Court for the Northern Mariana Islands denying the plaintiffs' motion for summary judgment and granting the defendants' motion for summary judgment, entered in this action on the 5th day of May, 1999. This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

THEODORE R. MITCHELL
Counsel for Plaintiff

/s/ T. R. Mitchell

(2)

Supreme Court, U.S.
FILED
DEC 1 1999
THE CLERK

No. 99-475

In the Supreme Court of the United States

STANLEY T. TORRES, ET AL., APPELLANTS

v.

MIGUEL M. SABLAN, ET AL.

ON APPEAL FROM THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether Congress lawfully approved a government for the Commonwealth of the Northern Mariana Islands, in which one chamber of the bicameral commonwealth legislature provides equal representation to the three principal island communities within the commonwealth and therefore does not conform to the "one person, one vote" principle required for legislative bodies in the States.

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In the Supreme Court of the United States

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STANLEY T. TORRES, ET AL., APPELLANTS

v.

MIGUEL M. SABLAN, ET AL.

ON APPEAL FROM THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-17a) is unreported.

JURISDICTION

The judgment of the district court was entered on May 5, 1999. The notice of appeal was filed on May 5, 1999. The jurisdictional statement was filed on July 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See note 2, *infra*.

STATEMENT

1. This case concerns a challenge to the electoral system of the Commonwealth of the Northern Mariana Islands (CNMI), a chain of islands stretching northward from Guam in the Pacific. The CNMI is an unincorporated territory that exists in a special relationship with the United States; it is neither a State nor an independent nation, but a self-governing commonwealth in union with and under the sovereignty of the United States. See 48 U.S.C. 1801 and note.

a. The CNMI was once part of the Trust Territory of the Pacific Islands, which the United States administered under the auspices of the United Nations trusteeship program. See, *e.g.*, *Northern Mariana Islands* v. *Atalig*, 723 F.2d 682, 684-685 (9th Cir.), cert. denied, 467 U.S. 1244 (1984); *Gale* v. *Andrus*, 643 F.2d 826, 828-830 (D.C. Cir. 1980). The Mariana Islands District included three principal island communities, or "municipalities": Saipan, Tinian, and Rota. The residents of those communities ultimately joined together to seek commonwealth status, and they entered into negotiations to that end with the United States. Those negotiations led to a 1975 agreement known as the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. 48 U.S.C. 1801 note; see S. Rep. No. 433, 94th Cong., 1st Sess. (1975); Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373, 1374-1384 (1977) (Willens & Siemer).

The Covenant "defines the relationship between the Commonwealth and the United States, sets up a framework and set of mandates for the Commonwealth Con-

stitution, and provides for the * * * termination of the trusteeship." *Wabol* v. *Villacrusis*, 958 F.2d 1450, 1459 (9th Cir.), cert. denied, 506 U.S. 1027 (1992). The Covenant establishes that, upon termination of the trusteeship, the CNMI became "a self-governing commonwealth * * * in political union with and under the sovereignty of the United States of America." Covenant, Section 101.[1] Changes to certain "fundamental provisions" of the Covenant—including the representational structure of the CNMI legislature, as well as the applicability to the CNMI of the laws and Constitution of the United States—require the consent of both the United States and the CNMI. *Id.*, Section 105.

Congress formally approved the Covenant in March 1976. See Pub. L. No. 94-241, § 1, 90 Stat. 263 (see 48 U.S.C. 1801 and note). In the course of its review, Congress considered, among other things, the history and culture of the Northern Marianas and the negotiations leading up to the Covenant. See S. Rep. No. 433, *supra*, at 23-58; see also *id.* at 65-94 (section-by-section analysis of Covenant). The Covenant was also approved by the Mariana Islands District legislature and by a plebiscite held among the residents of the affected islands. *Id.* at 63-64, 413-414.

The CNMI subsequently adopted a constitution, which was ratified by the people in March 1977, was deemed approved by the government of the United States in October 1977 (see Covenant, Section 202), and became effective on January 9, 1978. See Pres. Proc.

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[1] At the time the covenant was signed, the U.S. trusteeship remained in place. The covenant provided that the CNMI would assume commonwealth status upon termination of the trusteeship. Covenant, Section 101. The trusteeship was terminated on November 3, 1986. Pres. Proc. No. 5564, 51 Fed. Reg. 40,399 (1986).

No. 4534, 42 Fed. Reg. 56,593 (1977). Now that the trusteeship agreement has been terminated, the CNMI is under the sovereignty of the United States. Covenant, Section 101; S. Rep. No. 433, *supra*, at 15.

b. Section 203(c) of the Covenant specifies that the CNMI constitution "will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands." See also Covenant, Section 501(a) and (b) (generally extending Section 1 of the Fourteenth Amendment and certain other constitutional provisions to the CNMI, except that "[t]he applicability of [those] provisions * * * will be without prejudice to the validity of and the power of the Congress of the United States to consent to Section[] 203" and certain other Covenant provisions). The island communities of Rota and Tinian insisted upon that arrangement, see S. Rep. No. 433, *supra*, at 69, and, in its absence, would not have joined the Covenant, see Willens & Siemer, 65 Geo. L.J. at 1400-1401. See also J.S. App. 9a n.7; S. Rep. No. 433, *supra*, at 15-16.

The CNMI constitution fills in the details of this legislative structure. It provides:

> The senate shall consist of nine members with three members elected at large from each of three senatorial districts. The first senatorial district shall consist of Rota, the second senatorial district shall consist of Tinian and Aguiguan, and the third senatorial district shall consist of Saipan and the islands north of it. The senate shall be increased to twelve members and three members shall be elected at

> large from a fourth senatorial district consisting of the islands north of Saipan at the first regular general election after the population of these islands exceeds one thousand persons.

CNMI Const. Art. II, Sec. 2(a).

2. Appellants—two residents of the island of Saipan in the CNMI—brought this lawsuit on July 8, 1997, seeking declaratory and injunctive relief to redress the disparity in population among the CNMI senatorial districts. J.S. App. 5a-6a, 27a. Appellants contend that the disparity violates the Equal Protection Clause of the Fourteenth Amendment because the "malapportioned" senatorial districts dilute the electoral strength of Saipan residents in comparison to that of the residents of Tinian and Rota. An amended complaint named, as defendants, the members and executive director of the CNMI board of elections in their official capacities. *Id.* at 26a-28a. The CNMI, the commonwealth legislature, and the mayors of Rota and Tinian later intervened as defendants. *Id.* at 6a. The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Public Law No. 94-241, which approved the Covenant. J.S. App. 6a.

Sitting as a three-judge panel under 28 U.S.C. 2284, the district court granted summary judgment in favor of the defendants. J.S. App. 17a. The court concluded that the Equal Protection Clause did not prohibit Congress from approving the legislative arrangement set forth in the Covenant. In so holding, the court relied on the *Insular Cases*, a line of decisions issued by this Court at the beginning of this century concerning the relationship between the United States and its territories and possessions. See *id.* at 11a-12a n.9.

As the district court explained, the *Insular Cases* distinguish "unincorporated" territories, which are not destined for statehood, from "incorporated" territories, which are so destined. *E.g.*, *Downes* v. *Bidwell*, 182 U.S. 244, 339, 342 (1901) (White, J., concurring). In unincorporated territories, such as the CNMI (see J.S. App. 12a n.10, 16), the Constitution does not apply automatically, but imposes only "those fundamental limitations in favor of personal rights [that are] the basis of all free government." *Dorr* v. *United States*, 195 U.S. 138, 146- 147 (1904) (quoting *Downes*, 182 U.S. at 291 (White, J., concurring)); see J.S. App. 13a. The district court held that the "one person, one vote" principle falls short of that standard because several democratic governments, including the Government of the United States itself, have bicameral legislative arrangements under which one chamber is apportioned by geographic or similar criteria rather than by simple population. J.S. App. 16a-17a. The court therefore concluded that the arrangement created by Section 203(c) is valid and that its approval by Congress was lawful. *Ibid.*

ARGUMENT

The judgment of the district court is correct and should be summarily affirmed. As illustrated by the structure of our own national legislature and by a variety of legislative arrangements in other free countries, the bicameral arrangement created by Section 203(c) does not violate any principle forming "the basis of all free government," and Congress acted lawfully in approving it.[2]

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[2] This Court's jurisdiction rests on 28 U.S.C. 1253, which provides for a direct appeal of any order granting or denying injunctive relief in a case "required by any Act of Congress to be heard

1. This Court has long distinguished between "incorporated" territories, such as Alaska (before its admission to the Union), that are "destined for statehood from the time of acquisition," and "unincorporated" territories, such as Guam, that are not. See *Examining Bd. of Eng'rs* v. *Flores de Otero*, 426 U.S. 572, 599 n.30 (1976); see also *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Dorr*, 195 U.S. 138; *Balzac* v. *Porto Rico*, 258 U.S. 298 (1922) (collectively referred to as the *Insular Cases*). In unincorporated territories, the Constitution does not generally apply of its own force, and Congress may exercise its powers under the Territory Clause, U.S. Const. Art. IV, § 3, Cl. 2, to form local governments to suit local needs, limited only by those "principles which are the basis of all free government." *Dorr*, 195 U.S. at 147 (quoting *Downes*, 182 U.S. at 291 (White, J.,

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and determined by a district court of three judges." In turn, 28 U.S.C. 2284(a) provides that such a court shall be convened "when an action is filed challenging the constitutionality of the apportionment of * * * any statewide legislative body." This Court has construed the term "State statutes" in a similar jurisdictional statute (28 U.S.C. 2281 (repealed)) to cover the laws of territorial commonwealths that, while not States, are sufficiently autonomous as to warrant convening a three-judge court out of deference to local laws. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 669-676 (1974); see also 48 U.S.C. 1821(c), 1824 (providing that provisions of Title 28 are generally applicable to District Court for the Northern Mariana Islands). Because the CNMI enjoys such autonomy, we believe that a three-judge court was properly convened and that this Court has appellate jurisdiction over this case. We also believe that the district court correctly rejected the separate jurisdictional challenge (see J.S. App. 18a-24a) based on the mistaken notion that Section 902 of the Covenant provides an exclusive political remedy for any apportionment challenge. See *Reynolds* v. *Sims*, 377 U.S. 533, 553 n.25 (1964); *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-737 (1964); see also Covenant, Section 903.

concurring)); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) ("Only fundamental constitutional rights are guaranteed to inhabitants of [unincorporated] territories.") (internal quotation marks omitted); *Corporation of the Presiding Bishop* v. *Hodel*, 830 F.2d 374, 385 (D.C. Cir. 1987) (applying *Dorr* standard), cert. denied, 486 U.S. 1015 (1988).

As appellants concede (J.S. 7), the CNMI is an unincorporated territory. See *Wabol*, 958 F.2d at 1459 n.18 (citing *Atalig*, 723 F.2d at 691 & n.28); see also Covenant, Section 101 (CNMI is "a self-governing commonwealth * * * in political union with and under the sovereignty of the United States of America"); S. Rep. No. 433, *supra*, at 15; Willens & Siemer, 65 Geo. L.J. at 1397-1398. Under the *Insular Cases* doctrine, therefore, the only limitations on Congress's power to approve the CNMI's form of government are "'fundamental' constitutional rights" (*Verdugo-Urquidez*, 494 U.S. at 268) at "the basis of all free government" (*Dorr*, 195 U.S. at 147). The question here is whether the "one person, one vote" principle is such a right, and whether that principle therefore requires undoing the bicameral compromise without which the island communities of Rota and Tinian would not have joined the CNMI. See p. 4, *supra*.[3]

The answer is no. *Reynolds* v. *Sims*, 377 U.S. 533 (1964), upon which appellants principally rely, holds only that the "one person, one vote" principle is constitutionally required in legislative bodies within the

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[3] As the district court noted (J.S. App. 10a-14a), the Ninth Circuit has twice upheld other provisions of the Covenant deeming particular constitutional principles inapplicable to the CNMI. See *Wabol*, 958 F.2d at 1450; *Atalig*, 723 F.2d at 682. This Court denied certiorari in both cases. See *Wabol*, 506 U.S. at 1027; *Atalig*, 467 U.S. at 1244.

States. It nowhere suggests that "free government" is impossible where one house of a bicameral legislature is apportioned by criteria other than simple population. Indeed, any such notion is irreconcilable with the structure of our own federal government, as well as with the structure of a number of free foreign governments.

First, the United States Constitution establishes two Houses of Congress, one of which (the House of Representatives) is apportioned by population, and the other of which (the Senate) is "composed of two Senators from each State." U.S. Const. Art. I, § 3, Cl. 1; see also *id.*, Amend. XVII.[4] The CNMI's legislature follows the same model. Like Congress, it is bicameral, with one chamber representing the residents by population and another, smaller chamber representing geographic components. Like Congress, it exemplifies representative democracy within a polity formed by the conjunction of distinct entities.

Appellants' only response to this point (J.S. 14) is that the "historical and constitutional antecedents" to the composition of the Senate led the *Reynolds* Court to deem the federal example inapplicable to the States. That answer, however, cuts against appellants' position rather than for it. The bicameral structure of Congress, and the different apportionment schemes for the House

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[4] As James Madison explained, the allocation of two Senators to each State presents several advantages. One is the "additional impediment [that state representation in the Senate] must prove against improper acts of legislation. No law * * * can now be passed without the concurrence first of a majority of the people, and then a majority of the states." The Federalist No. 62, at 417 (James Madison) (Jacob E. Cooke ed., 1961). In our federal system, representation of the States in the Senate is also "a constitutional recognition of the portion of sovereignty remaining in the individual states." *Ibid.*

and Senate, resulted from "a compromise between the larger and smaller States," which "averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Reynolds*, 377 U.S. at 574; see also *INS* v. *Chadha*, 462 U.S. 919, 950 (1983); The Federalist No. 62 (James Madison), *supra*. Similar considerations led to the design of the CNMI Covenant. Section 203(c) is the product of a compromise between the more populated municipality of Saipan and the less populated municipalities of Tinian and Rota. Without that compromise, those islands would not have been unified in a single commonwealth, and the CNMI would not exist in its present form. See Willens & Siemer, 65 Geo. L.J. at 1400; see also S. Rep. No. 433, *supra*, at 15-16, 69.

In rejecting malapportioned state legislative arrangements, the *Reynolds* Court also reasoned that, unlike the role of States within the federal union, "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities." 377 U.S. at 575. By contrast, "the municipalities of Saipan, Tinian, and Rota are not governmental subdivisions created by the legislature, but are separate island communities with divergent histories, traditions and problems." S. Rep. No. 433, *supra*, at 69 (citing *Reynolds*, 377 U.S. at 575). Although the three islands were not sovereign in the same sense as the States, they had a similar claim to independence, which they gave up when they exercised the right of self-determination inherent in trusteeship and joined in political union with the United States. See Willens & Siemer, 65 Geo. L.J. at 1377 & n.14, 1380. Congress accordingly recognized that the CNMI's "departure from the One Man-One Vote rule thus is

justified under *Reynolds*." S. Rep. No. 433, *supra*, at 69.[5]

Moreover, even apart from the example of the United States Senate, "[s]everal countries that are considered to have 'free government' have a bicameral legislature in which one house is malapportioned." J.S. App. 16a. Such nations include many—such as Australia (equal representation of each state), Brazil (equal representation of each of its states and its federal district), and South Africa (equal representation of each province)—whose second chambers represent constituent parts of the nation. See 2 *World Encyclopedia of Parliaments and Legislatures* 848, 850 (George Thomas Kurian, ed. 1998). Examples of other free countries with distinctive arrangements in their second chambers include the United Kingdom (hereditary peers, until recently) and Italy (former presidents). *Ibid.* Those and similar

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[5] Commentators agree. See Willens & Siemer, 65 Geo. L.J. at 1401-1402 ("[T]hese islands have developed separate communities with customs and traditions distinct from one another. * * * In approving the Covenant, Congress understood and respected the separate island identities and recognized that the Covenant's requirement of equal representation in one house of the Northern Marianas legislature was for this reason fully consistent with the [*Insular Cases*]."); Don A. Farrell, *History of the Northern Mariana Islands* 481 (CNMI Public School System 1991) ("It is important to note that there was not complete cultural and political unity among the islands of the Marianas. The Rotanese culture had developed somewhat apart from that of Saipan. Both were rather different from the culture of the repatriated Chamorros from Yap living on Tinian."); *id.* at 531 ("Tinian and Rota developed along somewhat similar political lines. * * * Rota also developed its own municipal government, again along slightly different lines from either Saipan or Tinian. This is not unexpected as Rota has had a different historical experience than either Saipan or Tinian.").

examples belie appellants' claim that the CNMI's legislative arrangement violates a principle at "the basis of all free government" (*Dorr*, 195 U.S. at 147).

2. Appellants cite extensively from passages in *Reynolds* underscoring the importance of the "one person, one vote" principle as applied to the States. See J.S. 9-13. But the fact that the "one person, one vote" requirement is fundamental in that domestic sense does not mean that it is a "fundamental" right at "the basis of all free government" within the meaning of the *Insular Cases*. As the Ninth Circuit explained in a related context, "the doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one." *Atalig*, 723 F.2d at 689; see also *Wabol*, 958 F.2d at 1460. The selective incorporation of the Bill of Rights into the Due Process Clause restricts the conduct of the States and, within our federal system, protects certain rights against infringement by either federal or state action. By contrast, the *Insular Cases* doctrine is designed to preserve Congress's flexibility, under the Territory Clause, to act as it deems appropriate when dealing with unincorporated territories, which are not destined for inclusion within the federal system.[6]

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[6] Appellants rely (J.S. 13-14) on dicta in *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1 (1982), that "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." *Id.* at 7-8. In *Rodriguez*, this Court rejected a federal constitutional challenge to Puerto Rico's system of filling interim vacancies in its legislature. The Court did not decide the question presented here, and appellants do not suggest otherwise. Moreover, this Court has extended certain constitutional guarantees to the people of Puerto Rico on the understanding that, although those guarantees might

3. Appellants note that, under Ninth Circuit precedent, the court below could have conducted, but did not conduct (see J.S. App. 14a n.11), a further inquiry into whether application of the "one person, one vote" principle to the CNMI would be "impractical and anomalous." See *Wabol*, 958 F.2d at 1460-1462.[7] Appellants do not clearly contend, however, that the district court *should* have conducted that inquiry. See J.S. 16. And, indeed, such an inquiry would have cut against appellants' position, not for it.

As discussed above, the political compromise underlying Section 203(c) was necessary for political union within the Northern Marianas, and Congress properly "accommodat[ed] the unique social and cultural conditions and values of the particular territory." *Wabol*, 958 F.2d at 1460. The distinct experiences of each of the three principal island communities, as well as the goal

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not be applicable there of their own force, Congress *intended* that they be applied there—and had thus, with respect to Puerto Rico, implicitly "overruled" the "limitation on the application of the Constitution in unincorporated territories." *Torres* v. *Puerto Rico*, 442 U.S. 465, 470 (1979) (cited in *Rodriguez*, 457 U.S. at 7); see also *Examining Board of Eng'rs* v. *Flores de Otero*, 426 U.S. 572, 599 & n.30 (1976) ("The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform."). Here, by sharp contrast, Congress has formally approved the legislative arrangement designated in the Covenant, notwithstanding any "provisions of the Constitution" that might be invoked to the contrary. Covenant, Section 203(c); see Pub. L. No. 94-241, 90 Stat. 263; S. Rep. No. 433, *supra*, at 69.

[7] As the *Wabol* court indicated, the "impractical and anomalous" standard is a means of *preserving* Congress's power under the Territory Clause to "accommodate the unique social and cultural conditions and values of the particular territory." 958 F.2d at 1460-1461. The court highlighted the need for courts to "be cautious in restricting Congress' power in this area." *Ibid.*

of a unified commonwealth, justified Congress's decision to accept the Covenant's provision for their equal representation in the CNMI senate. As trustee, the United States was obligated both to preserve local culture and to respect the right of the Northern Marianas people to exercise self-determination. S. Rep. No. 433, *supra*, at 132 (reprinting trusteeship agreement). The legislative arrangement set forth in Section 203(c) of the Covenant is the product of such self-determination, and, indeed, it is identified as one of the "fundamental provisions of th[e] Covenant" that may be modified only upon the consent of both the United States and the CNMI. Covenant, Section 105. Invalidating it now would undermine the premise on which the CNMI itself was founded. As we have explained, the Constitution does not require that anomalous result.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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QUESTION PRESENTED

Whether the district court properly granted summary judgment to Appellees:

1. When undisputed evidence proved that equal representation of the islands of Saipan, Tinian and Rota in the Northern Mariana Islands Senate was essential to the formation of the Commonwealth of the Northern Mariana Islands, and to its political union with the United States under a negotiated and congressionally approved international agreement; and

2. When no evidence or authority showed that population-based representation in both houses of a bicameral legislature is the basis of all free government, and thus is a fundamental federal constitutional right under the *Insular Cases* doctrine developed in *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901).

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Pursuant to United States Supreme Court Rule 18.6, Appellees Miguel M. Sablan, et al., Commonwealth of the Northern Mariana Islands (CNMI), Eleventh Northern Marianas Commonwealth Legislature, Mayor of Tinian and Mayor of Rota move to affirm the unanimous and unreported decision of the three-judge district court. This case involves an equal protection challenge under the Fifth and Fourteenth Amendments to the composition of the CNMI Senate, in which the CNMI's three senatorial districts each have three senators. This apportionment, pursuant to the CNMI Constitution, implements a requirement of equal Senate representation contained in the negotiated international agreement which defines the CNMI's relationship with the United States: The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America, Pub. L. No. 94-241, 90 Stat. 263, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999) (Covenant).

The district court held that the CNMI Senate's composition neither violates federal equal protection guarantees nor falls within the population-based apportionment rule applicable to state legislatures under *Reynolds v. Sims*, 377 U.S. 533 (1964). The court entered summary judgment for Appellees upon undisputed evidence and law, which proved that population-based representation in both houses of a bicameral legislature is not the basis of all free government, and thus is not a fundamental federal constitutional right applicable automatically in the CNMI under the *Insular Cases* doctrine developed in *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901). J.S. App. 14a-17a.

Summary affirmance is appropriate because this fact-bound case presents no substantial federal question warranting plenary review. It has no conceivable impact or importance outside of the Northern Mariana Islands, and thus lacks the national significance required for such review. Equally important, the district court correctly applied the *Insular Cases* doctrine to

the undisputed material facts in this *sui generis* case. Fairness and judicial economy dictate summary affirmance of the judgment for Appellees.

OPINION BELOW

The district court's summary judgment order (J.S. App. 1a-17a) and judgment (Mot. App. 1a-2a) are unreported. They also are not available on Westlaw, Lexis, the Internet websites referenced by Appellants (J.S. 24) or any other computerized research service.

STATEMENT OF JURISDICTION

Appellants invoked jurisdiction in the district court under 48 U.S.C. § 1822(a), 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1343(a)(4). They sought declaratory and injunctive relief under 28 U.S.C. § 2201 and 42 U.S.C. § 1983. J.S. App. 28a, 34a-36a. A three-judge district court was convened under 28 U.S.C. § 2284(a), which applies to the district court pursuant to 48 U.S.C. § 1821(c), Covenant Section 403(b) and Covenant Section 502(a)(2). *See also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 670-676 (1974) (Commonwealth of Puerto Rico held to be a "State" under former 28 U.S.C. § 2281, which required three-judge district courts in actions to enjoin State statutes as unconstitutional). The district court granted summary judgment to Appellees and denied summary judgment to Appellants on May 5, 1999. J.S. App. 1a, 6a n.5, 18a-24a.

Before entry of judgment, Appellants noticed an appeal to this court on May 5, 1999. J.S. App. 37a. The district court entered judgment for Appellees on May 14, 1999. Mot. App. 1a-2a. This court may exercise jurisdiction notwithstanding the absence of a final judgment at the time Appellants noticed their appeal. *Bankers Trust Company v. Mallis*, 435 U.S. 381, 384-385 (1978). After Appellants filed a jurisdictional statement, this court docketed the appeal on September 20, 1999.

Appellants invoke this court's jurisdiction under 28 U.S.C. § 1253. J.S. App. 38a. Section 1253 applies to appeals from the district court pursuant to 48 U.S.C. § 1821(c), Covenant Section 403(b) and Covenant Section 502(a)(2). *See Calero-Toledo*, 416 U.S. at 670-676.

CONSTITUTIONAL PROVISIONS AND FEDERAL LAWS INVOLVED

The constitutional provisions involved are: (1) the United States Constitution's Fifth Amendment, Fourteenth Amendment Equal Protection Clause and Territorial Clause (Art. I, Sec. 3, Cl. 2); and (2) Section 2(a) of the Northern Mariana Islands Constitution.

Additional federal laws involved are Sections 105, 203(c) and 501 of the Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States Of America, Pub. L. No. 94-241, 90 Stat. 263, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 and note (West Supp. 1999). These authorities appear in the appendix to this motion. Mot. App. 8a-11a.

STATEMENT OF THE CASE

The Covenant embodies "the unique political relationship between the [C]NMI and the United States." *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684, 691 & n.28 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984). "The Covenant is an executive agreement under United States law, authorized by the executive recognition power and the President's power as Commander-in-Chief of the armed forces." Lizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau and Guam*, 31 HARV. INT'L L.J. 257, 272 (1990). (Def. Exh. 9).

> The Covenant is a permanent and binding agreement entered into between two sovereign peoples . . . [¶] Its composition is complex and its identity

> unique. It is a binding commitment by two peoples with certain provisions being so sacrosanct as to be unchangeable without the consent of both parties.

Wabol v. Villacrusis, 1 N. Mar. I., 19, 22 (1989) (citation omitted), *rev'd on other grounds*, 11 F.3d 124 (9th Cir. 1993). This unprecedented relationship followed nearly three decades of United States trusteeship jurisdiction over the Northern Mariana Islands as part of the Trust Territory of the Pacific Islands (TTPI).

I. Pre-Commonwealth Trust Territory of the Pacific Islands

On July 18, 1947, pursuant to a congressionally approved international agreement with the United Nations, the United States assumed trusteeship responsibility for three West Pacific island chains commonly known as Micronesia, which the United States had occupied since World War II. TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665 (Trusteeship Agreement). These Micronesian islands became the TTPI. The TTPI consisted of the Marshall Islands and the Caroline Islands, as well as the Northern Mariana Islands located about 100 miles north of Guam and 3900 miles west of Honolulu. *Saipan Stevedore v. Director, Workers' Comp. Programs*, 133 F.3d 717, 720 (9th Cir. 1998); *McComish v. C.I.R.*, 580 F.2d 1323, 1324 (9th Cir. 1978).

The Northern Mariana Islands are a chain of 21 small islands collectively comprising about 184 square miles of land surface. S. REP. NO. 596, 94TH CONG. 2D SESS. 2 (1976), *reprinted in* 2 1976 U.S. CODE, CONG. & ADMIN. NEWS 448, 449 (Def. Exh. 2).[1] The three largest and most populous islands are Saipan (47 square miles), Tinian (39 square miles) and Rota

1. Defendants' Exhibits (Def. Exh.) 1 through 15 were filed as attachments to the Declaration of Robert Goldberg. Appellee Eleventh Legislature's Exhibits (Leg. Exh.) A through JJ were filed either as separate documents or as attachments to the Declarations of Stephen C. Woodruff, Michael W. Dotts and Herbert Del Rosario.

(32 square miles). The population in the Northern Mariana Islands exceeded 43,000 in 1990, and grew to nearly 60,000 by 1997. Pl. Exh. at 002, 004; *Saipan Stevedore*, 133 F.3d at 720. According to 1990 federal census data, Saipan had approximately 90 percent of the population. Tinian and Rota each had about 5 percent. Pl. Exh. 002, 004.

To fulfill its trusteeship responsibilities, "the United States — through the Department of the Interior — created a bureaucracy known as the Trust Territory government." *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 649 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990). The Trust Territory government initially consisted of executive and judicial branches. It later included a bicameral Congress of Micronesia for the entire TTPI, as well as six local district legislatures. *McComish*, 580 F.2d at 1329. "Ultimate discretionary control over the Trust Territory government was retained by the Secretary of the Interior." *Temengil*, 881 F.2d at 650.

The United States did not have sovereignty in the Northern Mariana Islands or anywhere else in the TTPI. *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1371 n.1 (9th Cir. 1988), *aff'd*, 495 U.S. 182 (1990); *Ralpho v. Bell*, 569 F.2d 607, 619 n.71 (D.C. Cir. 1977); *Temengil v. Trust Territory of the Pacific Islands*, 33 Fair Empl. Prac. Cas. (BNA) 1027, 1031-1032 & n.16 (D.N. Mar. I. 1983), *rev'd on other grounds*, 881 F.2d 647, 649 n.1, 650 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990); *People of Saipan v. United States Department. of Interior*, 356 F. Supp. 645, 650 n.10, 653 n.18 (D. Haw 1973), *aff'd as modified on other grounds*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

"[S]overeignty [wa]s held in trust and ultimately repose[d] in the Trust Territory's inhabitants rather than in the United States, its Trust Territory government or the United Nations." *Temengil*, 33 Fair Empl. Prac. Cas. at 1032 n.16; *accord Porter v. United States*, 496 F.2d 583, 588 n.4 (Cl. Ct. 1974), *cert. denied*, 420 U.S. 1004 (1975) (collecting cases). "The

relationship between the United States and the Trust Territory's people [wa]s 'a fiduciary one . . . [in which] the interests of the inhabitants of the territory bec[a]me paramount.' " *Temengil*, 33 Fair Empl. Prac. Cas. at 1032 & n.17 (collecting authorities); *accord id.*, 881 F.2d at 649 n.1. *See also* SECOND INTERIM REPORT OF THE NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS TO THE CONGRESS OF THE UNITED STATES 38-42 (1985) (report pursuant to Covenant Section 504 analyzing federal-TTPI trust relationship and recommending that Congress continue to treat the CNMI as a trust relationship).

"The paramount duty of the United States was to steward Micronesia to self government." *Temengil*, 881 F.2d at 649; *accord Saipan Stevedore*, 133 F.3d at 720; *Gale v. Andrus*, 643 F.2d 826, 832 (D.C. Cir. 1980). Article 6.1 of the Trusteeship Agreement required the United States in relevant part to "promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned [.]" 61 Stat. 3302-3303. By the 1970's, however, "there d[id] not appear to have been any significant delegation of authority to the citizens of the Trust Territory" and the United States still exercised "a maximum degree of control [.]" *People of Saipan*, 356 F. Supp. at 655.

II. Negotiations For Commonwealth Status Under The Covenant

In 1969, the United States began negotiations with the Micronesians to determine Micronesia's future political status. In 1972, the United States entered into separate negotiations with the Northern Mariana Islands, whose residents wanted United States citizenship under a closer and permanent relationship with the United States that would accommodate their unique history, culture and conditions. *United States ex rel. Richards v. De Leon Guerrero*, 4 F.3d 749, 751 (9th Cir. 1993). *See generally* S. REP. NO. 433, 94TH CONG. 1ST SESS. 21-

22, 39-58 (1975) (S. REP. No. 433) (Leg. Exh. DD); Don A. Farrell, HISTORY OF THE NORTHERN MARIANA ISLANDS 589-598 (1991) (Def. Exh. 7); Arnold A. Leibowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L.J. 19 (1981). The Northern Mariana Islands had sought such a relationship with the United States since 1950, and in 1971 had threatened to secede forcibly from the TTPI in order to obtain it. S. REP. No. 433 at 18, 20, 45 (Leg. Exh. DD).

The conflicting interests of Saipan, Tinian and Rota complicated the negotiations for both sides. As noted by future United Nations Ambassador Donald F. McHenry in his analysis of the Covenant negotiations and the trusteeship:

> One issue which lay in the background of the Marianas negotiations and which may cause problems later was disagreement . . . between Rota, Tinian and Saipan. The people of Tinian objected to the apparent ease with which other Mariana Islanders particularly those on Saipan, were willing to negotiate land on Tinian; Rota . . . objected to the dominant role of Saipan.

Donald F. McHenry, MICRONESIA: TRUST BETRAYED 163 (1975) (MICRONESIA) (Pl. Exh. at 111).

After more than two years, the negotiations resulted in the Covenant. "Some of the differences between the Marianas were smoothed over in the [C]ovenant [.] . . . *By far the major protection for Tinian and Rota is a [C]ovenant provision that the Marianas Legislature be bicameral with one house of equal representation.*" *Id.* (emphasis added). This provision appears in Covenant Section 203(c). Although the Covenant makes both the Fifth Amendment and the Fourteenth Amendment's Equal Protection Clause applicable in the CNMI, the Covenant specifically qualifies that their application is "without prejudice to the validity of and the power of the Congress of the United States to consent to sectio[n] 203 [.]" COVENANT SECTION 501(b). Covenant Section 105 includes Section 203 among the

fundamental Covenant provisions which may be modified only with the mutual consent of the United States and the CNMI.

Formal approval of the Covenant occurred quickly after its signature by the parties thereto on February 15, 1975. *See generally* HISTORY OF THE NORTHERN MARIANA ISLANDS 599-605 (Def. Exh. 7). Within a week, the Marianas District Legislature unanimously approved the Covenant after reviewing it as required by Covenant Section 1001(a). Res. 76-1975, Fourth Mariana Islands District Legislature, 5th Sess. (Feb. 20, 1975), *reprinted in Hearing Before the Subcommittee On Territorial And Insular Affairs of the House Committee on Interior and Insular Affairs on H.J. Res. 549 et al.*, 94th Cong. 1st Sess. 608-610 (1975) (*H.J. Res. 549 Hearing)* (Leg. Exh. CC). On June 17, 1975, the people of the Northern Mariana Islands approved the Covenant by a 78.8 percent vote, with 95 percent of all registered voters turning out at the polls. Super-majorities approved the Covenant on every island, including Saipan. H.R. REP. NO. 364, 94TH CONG. 1ST SESS. 4 (1975) (Leg. Exh. EE); *H.J. Res. 549 Hearing* at 378, 381 (Leg. Exh. CC). Following congressional approval, President Ford signed the Covenant into law on March 24, 1976. 12 WEEKLY COMP. PRES. DOC. 482 (Mar. 24, 1976) (Leg. Exh. JJ).

In accordance with Covenant Section 201, the Northern Mariana Islands held a constitutional convention, which drafted a constitution overwhelmingly ratified by voters in March 1977. *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1990), *cert. denied sub nom. Philippine Goods, Inc. v. Wabol*, 506 U.S. 1027 (1992). Section 2(a) of the CNMI Constitution implemented Covenant Section 203(c) by apportioning three senators to each of the CNMI's three senatorial districts: (1) Rota; (2) Tinian and Aguiguan; and (3) Saipan and islands north of Saipan. J.S. 2.

As provided by Covenant Section 202, the CNMI Constitution automatically took effect on October 22, 1977, six months after its submission to the United States Government.

President Carter memorialized the effective date of approval two days later. PRESIDENTIAL PROCLAMATION No. 4534, 42 FED. REG. 56,593 (October 24, 1977). Pursuant to Covenant Sections 101 and 1003(c), the CNMI came under United States sovereignty for the first time when President Reagan terminated the trusteeship in November 1986. PRESIDENTIAL PROCLAMATION No. 5564, 51 FED. REG. 40,399 (November 3, 1986).

The instant action under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 for declaratory and injunctive relief challenges the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a). Appellants seek a declaration that the CNMI Senate's composition violates the Fourteenth Amendment's Equal Protection Clause, specifically the rule of population-based state legislative apportionment under *Reynolds v. Sims*, 377 U.S. 533 (1964). J.S. at 9-15; J.S. App. 26a, 32a, 34a, 35a.[2] Appellants further seek an injunction ordering a special election to choose a CNMI Senate apportioned by population. J.S. App. 26a, 27a, 35a.

A three-judge district court, convened under 28 U.S.C. § 2284(a), unanimously upheld the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a). J.S. App. 1a, 6a n.5, 8a-24a. This appeal under 28 U.S.C. § 1253 followed. J.S. App. 37a.

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2. The Fourteenth Amendment does not restrain federal action. On appeal, Appellants for the first time appear to raise a *Bivens* claim for federal violation of the Fifth Amendment's equal protection component. *See* J.S. 3, 6-7, 15; *Davis v. Passman*, 442 U.S. 228, 242-243 (1979). This court may disregard this new argument, which does not alter the basic issue. *National Collegiate Athletic Association v. Smith*, __ U.S. __, 119 S. Ct. 924, 930 (1999). Because equal protection guarantees under the Fifth and Fourteenth Amendments are coextensive, equal protection analysis is the same under both Amendments. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217, 224, 234 (1995). The district court addressed Fifth Amendment equal protection doctrine by deciding the case in part in terms of congressional authority to approve Covenant Section 203(c). *See* J.S. App. 8a-9a, 14a-15a, 17a.

ARGUMENT

I. This Case Has No Impact Or Importance Outside Of The Northern Mariana Islands

In a letter to Congress supporting elimination of its mandatory appellate jurisdiction, this court lamented the burden imposed by "cases that are of significance only to the individual litigants but of no 'wide public importance.' " H.R. REP. NO. 660, 100TH CONG. 2D SESS. 27 (1988), *reprinted in* 4 1988 U.S. CODE, CONG. & ADMIN. NEWS 766, 782. This is such a case.

Summary affirmance is appropriate because this case has no national significance. It is fact-bound and has no conceivable impact or importance outside of the CNMI. As Appellants note, local legislative apportionment is governed by *Reynolds v. Sims* in the fifty States, and by congressional legislation in Guam, Puerto Rico and the Virgin Islands. J.S. 25. The unreported decision below does not affect any other jurisdiction or people under the American flag. It is *sui generis*, as are the Covenant and the CNMI's commonwealth relationship with the United States. *Richards*, 4 F.3d at 754; *Atalig*, 723 F.2d at 684, 691 n.28.

The decision's unreported status reflects its lack of national significance. It is not available in any national or regional publication, nor is it posted on Westlaw, Lexis, the Internet websites referenced by Appellants (J.S. 24) or any other computerized research source. In fact, it may not even be citable in the Ninth Circuit, where the district court which rendered it sits. *Compare People of the Territory of Guam v. Yang*, 800 F.2d 945, 947 n.2 (9th Cir. 1986) (unpublished district court decisions are citable) *with Prestin v. Mobil Oil Corp.*, 741 F.2d 268, 270 n.3 (9th Cir. 1984) (unpublished district court decisions are not citable).

Since the CNMI came into being, this court has denied review without dissent in all cases from the CNMI. Two cases involved Covenant restrictions of constitutional rights at least

as cherished, if not more so, than those asserted here. One case upheld the Covenant's denial in CNMI courts of the right to jury trial in serious criminal cases which applies in state courts under *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Atalig*, 723 F.2d at 684-691, *cert. denied*, 467 U.S. 1244. The second case rejected an equal protection challenge to the Covenant's restriction of CNMI land ownership to the indigenous people of the CNMI. *Wabol*, 958 F.2d at 1452, 1458-1462, *cert. denied*, 506 U.S. 1027. The right to jury trial denied in *Atalig* " 'lies at the base of all our civil and political institutions' " as part of the constitutional guarantee of a fair trial, "the most fundamental of all freedoms." *Duncan*, 391 U.S. at 148-149; *Estes v. Texas*, 381 U.S. 532, 540 (1965). The property rights denied in *Wabol* also are constitutionally sacred. "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972); *accord Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Given the determination that *Atalig* and *Wabol* warranted *no* review, this case clearly does not warrant *plenary* review.[3]

With one exception, this court also denied without dissent every pre-commonwealth certiorari petition originating in the TTPI. Several unreviewed cases involved the Trusteeship

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3. *See also Angello v. Commonwealth of the Northern Mariana Islands*, 106 F.3d 406 (9th Cir.), *cert. denied*, __ U.S. __, 118 S. Ct. 87 (1997); *Ferreira v. Borja*, 93 F.3d 671 (9th Cir. 1996), *cert. denied*, 519 U.S. 1122 (1997); *Commonwealth of the Northern Mariana Islands v. Condino*, 33 F.3d 58 (9th Cir. 1994), *cert. denied*, 514 U.S. 1021 (1995); *Aldan-Pierce v. Mafnas*, 31 F.3d 756 (9th Cir. 1994), *cert. denied*, 513 U.S. 1116 (1995); *Commonwealth of the Northern Mariana Islands v. Kawano*, 917 F.2d 379 (9th Cir. 1990), *cert. denied*, 499 U.S. 910 (1991); *Fleming v. Department of Public Safety*, 837 F.2d 401 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988); *Temengil v. Trust Territory of the Pacific Islands*, 33 Fair Empl. Prac. Cas. (BNA) 1027 (D.N. Mar. I. 1983), *rev'd*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

Agreement's enforceability in federal court and the legality of United States nuclear weapons testing in the TTPI.[4] The only case reviewed was the McCarthy era case of *Vitarelli v. Seaton*, 359 U.S. 535 (1959), which held that the Interior Department wrongfully fired one of its TTPI teachers based in part upon his political associations and beliefs. This holding protected Interior Department employees nationwide and abroad from similar mistreatment. Unlike the instant case, *Vitarelli* transcended its immediate parties, facts and locality.

Apart from *Vitarelli*, cases arising in the CNMI and the former TTPI have lacked the widespread impact or importance required for review. So does this case. Unlike other Pacific Basin cases pending in this court, the instant case involves neither alleged racial discrimination with broad public implications nor an inter-circuit conflict requiring resolution.[5] This case has no

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4. *People of Saipan v. United States Department of Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975); *Nitol v. United* States, 7 Cl. Ct. 405 (1985), *dismissed* 12 Cl. Ct. 690 (1987), *aff'd*, *People of Enewatak v. United States*, 864 F.2d 134 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 909 (1989); *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960). *See also United States v. Covington*, 783 F.2d 1052 (9th Cir. 1985), *cert. denied*, 479 U.S. 931 (1986); *Groves v. United States*, 533 F.2d 1376 (5th Cir.), *cert. denied*, 429 U.S. 1000 (1976); *Porter v. United States*, 496 F.2d 583 (Cl. Ct. 1974), *cert. denied*, 420 U.S. 1004 (1975); *Callas v. United States*, 152 F. Supp. 17 (E.D.N.Y. 1957), *aff'd*, 253 F.2d 838 (2d Cir.), *cert. denied*, 357 U.S. 936 (1958).

5. In *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), *cert. granted*, __ U.S. __, 119 S. Ct. 1248 (1999) (No. 98-818), the petitioner contends that a Hawaii state constitutional provision allowing only Native Hawaiians to vote for trustees of the Office of Hawaiian Affairs constitutes racial discrimination barred by the Fourteenth and Fifteenth Amendments. In *Ada v. Government of Guam*, 179 F.3d 672 (9th Cir.), *cert. granted*, __ U.S. __, 120 S. Ct. 34 (1999) (No. 99-51), the Ninth Circuit's construction of a Guam Organic Act section on gubernatorial elections rejected the Third Circuit's construction of virtually identical language in the Virgin Islands Organic Act.

significance beyond the CNMI. For this reason alone, the three-judge district court's unanimous decision should be summarily affirmed.

II. The Three-Judge District Court's Unanimous Decision Was Correct

Plenary review is unwarranted not only because this case lacks national significance, but also because the three-judge district court's unanimous decision was correct. The undisputed evidence required summary judgment for Appellees, and the district court properly rejected Appellants' equal protection challenge to the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a).

A. Under The *Insular Cases* Only Rights Which Are The Basis Of All Free Government Are Fundamental Constitutional Rights Which Apply Of Their Own Force In The Northern Mariana Islands

The central issue is whether federal equal protection doctrine makes applicable in the CNMI the population-based rule of state legislative apportionment announced in *Reynolds v. Sims*, 377 U.S. 533 (1964), notwithstanding the Covenant's mandate of equal representation of Saipan, Tinian and Rota in the CNMI Senate. This issue turns upon the evidence as analyzed under the *Insular Cases* doctrine of "fundamental rights" developed primarily in *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901).[6] This court most recently

6. The other *Insular Cases* are *Ocampo v. United States*, 234 U.S. 91 (1914); *Dowdell v. United States*, 221 U.S. 325 (1911); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. N.Y. & P.R. Steamship Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); (Cont'd)

reaffirmed the *Insular Cases* doctrine in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-269 (1990); *accord id.* at 277-278 (Kennedy, J., concurring). Appellants concede that "the district court was right to employ the *Insular Cases* doctrine as the rule of decision in this case [.]" J.S. 5.

Under the *Insular Cases* doctrine, the entire United States Constitution automatically applies of its own force, without congressional action, only as to "incorporated" territories, which are territories "destined for statehood from th[eir] time of acquisition" by the United States. *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.26 (1976); *Downes*, 182 U.S. at 311 (White, J., concurring). The States of Alaska and Hawaii were incorporated territories. *See Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4-5, 8 n.12 (1955). The CNMI is not an incorporated territory. *See Atalig*, 723 F.2d at 691 & n.28.

In "unincorporated" territories not destined for statehood, only "fundamental" constitutional rights apply of their own force. Others apply only if extended by Congress pursuant to the Territorial Clause or another federal source of authority. *Verdugo-Urquidez*, 494 U.S. at 268; *Otero*, 426 U.S. at 599 n.30; *Balzac*, 258 U.S. at 304-305.

Courts have treated the CNMI as unincorporated for purposes of the *Insular Cases* doctrine, even though the CNMI, a *sui generis* Commonwealth, is not a "territory" in the sense of being a federal instrumentality subject to plenary federal control. *Wabol*, 958 F.2d at 1459-1460 & n.18; *Atalig*, 723 F.2d at 687 & n.15, 691 & n.28; *see* Covenant Section 105; *Richards*,

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(Cont'd)

and *DeLima v. Bidwell*, 182 U.S. 1 (1901). *See generally* James E. Kerr, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM 27-111 (1982); Arnold H. Leibowitz, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 17-29 (1989); Juan R. Torruela, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 40-84, 93-115 (1985); Frederick Coudert, *The Origins of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926).

4 F.3d at 754-755; *Commonwealth of the Northern Mariana Islands v. Peters*, 1 N. Mar. I. 466, 472-473 (1991). *Compare United States v. Wheeler*, 435 U.S. 313, 321 (1978) (territorial governments are federal agencies); *O'Donoghue v. United States*, 289 U.S. 516, 537 (1933) (a territory is a federal "governmental subdivision" which "quite as well could have been called a 'colony' or a 'province' "). The term "unincorporated territory" also was deemed sufficiently elastic to encompass the TTPI, even though the United States lacked sovereignty there. *See Ralpho*, 569 F.2d at 618-619 & nn.69-70; *Temengil*, 33 Fair Empl. Prac. Cas. at 1058-1060 & n.121; *Sechelong v. Trust Territory of the Pacific Islands*, 2 T.T.R. 526, 529-530 (H. Ct. Tr. Div. 1964).

Under the *Insular Cases* doctrine, "fundamental rights" which apply of their own force in unincorporated territories consist of "limitations in favor of personal rights" which are "indispensable" as "the basis of *all free government*." *Dorr*, 195 U.S. at 146, 147 (emphasis added); *accord Downes*, 182 U.S. at 282-283; *id.* at 290-291 (White, J., concurring). When applying the *Insular Cases* fundamental rights concept in Covenant cases, the Ninth Circuit interprets it to connote a "narro[w] definition of fundamentalness" in "th[e] *international* sense." *Wabol*, 958 F.2d at 1460 (emphasis by court). This interpretation comports with Justice White's view, which this court later declared to be "settled law," that unincorporated territories, while not foreign countries in relation to the United States, are "foreign to the United States in a domestic sense." *Downes*, 182 U.S. at 341-342 (White, J., concurring); *see Balzac*, 258 U.S. at 305.

The district court was faithful to the letter and spirit of the *Insular Cases* doctrine. It recognized that not every fundamental right under the Equal Protection Clause in the fifty States automatically applies in insular commonwealths and territories, regardless of their local traditions, culture and conditions. "In the territorial context, the definition of a basic and integral

freedom must narrow to incorporate the shared beliefs of diverse cultures." *Wabol*, 958 F.2d at 1460.

The *Insular Cases* permit the flexible accommodation of local conditions by Congress and the sovereign insular people with whom the United States negotiated a unique political union. *Id.*; *see Balzac*, 258 U.S. at 309-311; *Mankichi*, 190 U.S. at 211, 218. The Senate Committee on Interior and Insular Affairs confirmed that

> [t]he commonwealth status of the Northern Mariana Islands was developed on the basis of their particular needs drawing on the experience of all other territories of the United States, especially those of Guam, with the advantages and disadvantages of which the people of the Northern Mariana Islands have first hand acquaintance.

S. REP. No. 433 at 65 (Leg. Exh. DD).

The determination by Congress and the people of the Northern Mariana Islands in the Covenant as to the practicability and application of constitutional provisions in the CNMI is entitled to great weight. *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 470 (1979). The CNMI's choice of legislative structure, and its assessment of the justification and need for that structure, also are entitled to "substantial deference." *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982).

"It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection." *Wabol*, 958 F.2d at 1460 n.18. As Appellees now will show, the undisputed evidence proved that the specific right claimed by Appellants – population-based bicameral legislative apportionment – is not a fundamental right under the *Insular Cases* because it is not the basis of all free government.

B. The Undisputed Evidence Proved That Population-Based Representation In Both Houses Of A Bicameral Legislature Is Not The Basis Of All Free Government

The district court properly granted summary judgment to Appellees, who presented overwhelming and undisputed evidence which proved that free governments often feature numerically equal legislative representation in one house of a bicameral legislature. In a decision applying *Reynolds* to the State of Hawaii, this court cautioned that constitutional violations "must appear from evidence in the record," and that "[s]peculations do not supply evidence [.]" *Burns v. Richardson*, 384 U.S. 73, 88 & n.14 (1966). Appellants failed to satisfy this requirement.

Appellants did not identify any nation or jurisdiction outside the United States which requires *Reynolds*-style population-based representation even in one house of a bicameral legislature, let alone in both houses. They presented no evidence that population-based representation in both houses of a bicameral legislature is the basis of *all* free government. Nor could they do so, since no such evidence exists. Appellants' failure to establish a genuine, material and triable factual issue mandated summary judgment for Appellees. FED. R. CIV. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-587 (1986).

As the district court held, the United States Senate is living proof that numerically *equal* legislative representation of each political unit sometimes is indispensable to a free government. J.S. App. 16a-17a. The inter-State population disparity in the United States Senate is far greater than the inter-island population disparity in the CNMI Senate. The approximate 60-to-1 disparity between California and Wyoming, for example, far exceeds the 20-to-1 disparity between Saipan and Rota. II Kurian, WORLD ENCYCLOPEDIA OF PARLIAMENTS AND LEGISLATURES 850 (Cong. Quarterly 1998) (WORLD

ENCYCLOPEDIA) (Def. Exh. 12). Wyoming's 480,000 residents thus share equal representation with over 32 million residents of California.

This equal representation has been at the heart of American constitutional federalism since 1787. *Reynolds*, 377 U.S. at 547-548, 574. "Rota and Tinian with their representatives took the strongest position that their interests had to be protected in this fashion and cited the U.S. Constitution as their example." *Marianas Political Status: Hearing Before The Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs* 94th Cong. 1st Sess. 93, 98 (1975) (*Marianas Status Hearing*) (statement of United States Ambassador Williams) (Leg. Exh. FF).

The bicameral Congress of Micronesia supplied a precedent from the TTPI which the Covenant's framers also found relevant. In 1964, the United States created the Congress of Micronesia (COM) in an effort to fulfill its Trusteeship Agreement duty to promote Micronesian self-government. The six TTPI districts each had two seats in the COM Senate, notwithstanding very significant population disparities between the districts. *E.g.*, INTERIOR DEPARTMENT SECRETARIAL ORDER NO. 2282, 29 FED. REG. 13613 (Sept. 28, 1964). The head of the United States' Covenant negotiating team and two congressional co-sponsors of the Covenant agreed that the COM Senate provided a strong precedent for the equal CNMI Senate representation mandated by Covenant Section 203(c). *Marianas Status Hearing* at 113-114 (statements of Ambassador Williams, Representative Lagomarsino and Representative Clausen) (Leg. Exh. FF).

The legislatures of the world's leading democracies further document that population-based representation in both houses of a bicameral legislature is not the basis of all free government. "Approximately one-third of the 170 or so national legislatures in the world are bicameral in form. All large western-style democracies have bicameral, or two-chamber, legislatures [.]"

WORLD ENCYCLOPEDIA 848 (Def. Exh. 12). The states of Australia and the provinces of Canada have numerically equal representation in the senates of those nations' bicameral legislatures. WORLD ENCYCLOPEDIA 850-851 (Def. Exh. 12). Thus, the Australian state of Tasmania, with fewer than 500,000 residents, has equal representation with the approximately 6.1 million residents of the state of New South Wales. I THE EUROPA WORLD YEAR BOOK 1999 (Europa Publications Ltd. 1998) 453 (WORLD YEAR BOOK) (Def. Exh. 13). Other democratic countries with bicameral legislatures, in which one house provides numerically equal representation to all political units, include Argentina, Brazil, Mexico, South Africa and Switzerland. WORLD ENCYCLOPEDIA 850 (Def. Exh. 12); WORLD YEAR BOOK 2976, 2984 (Def. Exh. 13); G.H. Flanz, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 30, 33, 52 (1998) (Def. Exh. 14).

Appellants failed to establish what the *Insular Cases* require: proof that population – based bicameral legislative apportionment is indispensable to *all* free government. Because the undisputed evidence established just the opposite, judgment for Appellees was required.

C. The Undisputed Evidence Proved That Equal Representation In The Northern Mariana Islands Senate Was Essential To Formation Of The Commonwealth Of The Northern Mariana Islands And To Its Political Union With The United States

The undisputed evidence below proved that equal representation in the CNMI Senate was essential to the CNMI's formation and to its negotiated political union with the United States. As Appellants acknowledge, the mandate of equal representation embodied in Covenant Section 203(c) "was demanded by the Rota and Tinian delegations to the Marianas Political Status Commission on the eve of the signing of the Covenant" in early 1975. J.S. 23. Appellees proved this point, and the necessity of Section 203(c) to the CNMI's formation and political union with the United States, by overwhelming and undisputed evidence.

As written by the lead consultants to the 1976 Northern Mariana Islands Constitutional Convention, whose analysis of the Covenant and the CNMI Constitution came into evidence:

> The provision for equal representation in the upper house of the legislature accomplished two purposes: it permitted the three islands to form a common political entity, and it permitted that political entity to affiliate with the United States. The compromise giving each major island equal representation in the senate was one of the essential requirements in securing the accession of the islands to a united political entity. The individual islands in the Northern Marianas were free not to participate in negotiations with the United States looking toward a common political status in union with the United States. Rota and Tinian are substantially smaller than Saipan in terms of both population and resources, and they were unwilling to accede to a permanent political union with Saipan without adequate protection of their separate interests in at least one house of the legislature.

Howard P. Willens and Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1400 (1977) (Def. Exh. 6).

> As the negotiating history of the Covenant demonstrates, this concession to the interests of the smaller islands of Rota and Tinian was essential in securing the agreement of the Northern Marianas to the Covenant. The demand for equal representation was unanimously supported by the Northern Marianas negotiators. Faced with the prospect that no status agreement would be achieved without this compromise, the United States representatives agreed to the proposal.

Id. at 1401 (Def. Exh. 6); *accord Hillblom v. United States*, 3 N. Mar. I. Commw. Rptr. 295, 297, 304-305 (D.N. Mar. Is. 1988); Leg. Exh.. C at 16 n.43 (CNMI Supreme Court opinion); Leg. Exh. D at 28-29 (CNMI Superior Court opinion).

The demand of Tinian and Rota for equal representation in the CNMI Senate stemmed from their dissatisfaction with Saipan's domination of the unicameral Marianas District Legislature during the trusteeship. The Marianas District Legislature was created and apportioned based on population by order of the United States' TTPI High Commissioner in 1963. Saipan had 11 representatives and Rota had 3 representatives. Tinian had 1 representative, as did the smaller islands north of Saipan. Pl. Exh. at 026-030; *Marianas Status Hearing* at 113-114 (statement of Ambassador Williams) (Leg. Exh. FF). This apportionment disadvantaged Tinian and Rota.

> Tinian and Rota . . . had been largely ignored by . . . the trust territory administration. Rota had been especially isolated. It had been shuffled around from district to district, sometimes being a district by itself. Rarely did an administrator visit Rota. Even after the creation of the Marianas District Legislature, the three representatives from Rota and the single Tinian representative had little voice in legislative affairs. Few funds went to Rota or Tinian for roads, utilities, schools or medical facilities.

HISTORY OF THE NORTHERN MARIANA ISLANDS 619-622 (Def. Exh. 7).

In light of this history, Tinian and Rota did not want Saipan to have disproportionate legislative power again. Tinian feared Saipan's willingness to give away Tinian's lands. MICRONESIA at 163 (Pl. Exh. at 111). Rota's concerns ran equally deep. On January 20, 1975, the Rota Municipal Council adopted a resolution demanding equal Senate representation to ensure the fair treatment of Rota and Tinian:

> *Under the present Trust Territory administration, Rotanese have consistently been treated as the poor cousins of our Saipan neighbors.* We have submitted budget requests which have been ignored, while the approved budget affecting Rota is controlled and administered by the District Administration on Saipan. We have sought financial assistance from the District Legislature for our Municipal Operating expenses and the response has been unsatisfactory . . . Recommendations made by our District Administrator's Representative and his department heads, our Municipal Council, and our Mayor have been consistently disregarded.
>
> The People of Rota wish to be a part of the Commonwealth of the Northern Mariana Islands. However, *the people of Rota cannot approve a form of government which will perpetuate the discrimination practiced in the past against our island community* . . . [¶]
>
> *The central government legislature must be bicameral, with a senate composed [of] equal representation from each of the present municipalities* and a House of Representatives based on population figures and traditional voting patterns. *This plan will help protect the interests of Tinian and Rota* while ensuring Saipan a healthy majority in the House of Representatives. *A bicameral legislature is essential to the fair and equal treatment of Tinian and Rota.*

Mot. App. 4a-5a (emphasis added).

The proposed Covenant was promptly revised to include Section 203(c). As the CNMI's Covenant negotiators later explained to CNMI voters:

> The establishment of the commonwealth involves compromise and concessions which reflect the

> different historical and geographic interests of the major islands in the Northern Marianas group, as well as population. If this sentence [203(c)] were not included [in the Covenant] Tinian and Rota would be limited to representation in the new commonwealth which is based entirely on population. The [Marianas Political Status] Commission concluded that, in light of the past experience of the people of Rota and Tinian and the need for their support of the Covenant, the protection afforded them by Section 203(c) was entirely appropriate and desirable.

Marianas Political Status Commission, *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* 25 (Feb. 15, 1975) (Def. Exh. 1), *reprinted in H.J. Res. 549 Hearing* at 633-634 (Leg. Exh. CC).

The CNMI's formation and political union with the United States would have not have occurred without the inclusion of Section 203(c) in the Covenant. The Covenant Joint Drafting Committee and the CNMI's negotiators reported that Section 203(c) and the other fundamental provisions identified in Section 501(b) "constitute integral parts of the mutual compromises and concessions without which the accession of the Northern Mariana Islands to the United States would not have been possible." S. REP. No. 433 at 405 (Leg. Exh. DD); *accord H.J. Res. 549 Hearing* at 376, 640 (Leg. Exh. CC). The United States' lead Covenant negotiator confirmed to Congress that the United States agreed to Section 203(c) because the CNMI "made it a condition necessary for their approval of the Covenant." *Marianas Status Hearing* at 108 (statement of Ambassador Williams) (Leg. Exh. FF).

The evidence was undisputed and overwhelming. But for the Covenant's guarantee of equal representation in the CNMI Senate, there would not have been a CNMI or a political union

with the United States.[7] This uncontested fact required judgment for Appellees. So did the constitutional rationale of *Reynolds v. Sims*, as Appellees now will explain.

D. The Federal Analogy Discussed In *Reynolds v. Sims* Supports The Equal Senate Representation Mandated By The Covenant And The Northern Mariana Islands Constitution

Appellants misplace their reliance upon *Reynolds v. Sims*, the rationale of which in fact supports Covenant Section 203(c)'s mandate of equal representation in the CNMI Senate. J.S. i, 9-15. Section 203(c) is analogous to United States Constitution Article I, Section 3, which gives each State numerically equal representation in the United States Senate. The circumstances leading to equal Senate representation in both instances were not merely analogous. They were identical. In both instances, equal Senate representation was required to ensure political union. Without it, political union would not have occurred in either instance.

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7. Contrary to Appellants' claim (J.S. 15-25), it would be impractical and anomalous to mandate population-based apportionment of the CNMI Senate. Section 203(c) is one of the fundamental provisions of the Covenant which the United States pledged not to modify without the CNMI's consent. COVENANT SECTION 105. As stated by the Ninth Circuit, "[i]t would be truly anomalous to construe the equal protection clause to force the United States to break its pledge [.]" *Wabol*, 958 F.2d at 1462. It also would frustrate the core purpose of equal protection doctrine, which is to protect the rights of minorities such as the outnumbered residents of Tinian and Rota. *Id.* "If the federal courts hold that the principle of population alone must apply to the apportionment of the Northern Marianas Legislature . . . then the entire Northern Marianas agreement will be thrown into disarray. If one of its fundamental parts is invalid, then the very basis for the compact is imperiled." Paul M. Leary, THE NORTHERN MARIANAS COVENANT AND AMERICAN TERRITORIAL RELATIONS 27 (Univ. Calif., Berkeley, Institute of Governmental Studies, 1980-1981) (Leg. Exh. D at 30 n.15).

In *Reynolds v. Sims*, the State of Alabama tried to justify its malapportioned legislature by analogizing perceived county sovereignty issues in state legislative apportionment to State sovereignty concerns involved in the "Great Compromise" at the Constitutional Convention of 1787, which resulted in numerically equal State representation in the United States Senate. *See Reynolds*, 377 U.S. at 547-548, 574; *Wesberry v. Sanders*, 376 U.S. 1, 12-14 & n.27 (1964). This court rejected Alabama's federal analogy as inapposite.

> The system of representation in the two Houses of our Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic . . . [I]t is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government . . . [A]t the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to a single national government . . . The so-called federal analogy is inapplicable as a sustaining precedent for state legislative apportionments . . . [A]t the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation . . . [¶] Political subdivisions of States - counties, cities or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental

> functions . . . The relationship of the States to the Federal Government could hardly be less analogous.

Reynolds, 377 U.S. at 574-575.

In contrast, the federal analogy *does* apply to the CNMI's formation and political union with the United States. The undisputed record shows that the compromise effected by the addition of Section 203(c) to the Covenant was the CNMI equivalent of the Great Compromise of 1787. An Administration report by the Office of Micronesian Status Negotiations reached essentially this conclusion in determining that Covenant Section 203(c) comported with the constitutional principles of *Reynolds v. Sims*.

> This provision was inserted at the insistence of the chartered municipalities of Rota and Tinian. Without the votes of their representatives in the Marianas Political Status Commission this Covenant could not have been concluded. This departure from the One Man-One Vote rule thus is justified under Reynolds v. Sims, 377 U.S. 533, 574 (1964). Moreover, the municipalities of Saipan, Tinian and Rota are not governmental subdivisions created by the Legislature, but are separate island communities with divergent histories, traditions and problems. *Id.* at 575.

H.J. Res. 549 Hearing at 385 (Leg. Exh. CC).

The 1976 CNMI Constitutional Convention which implemented Section 203(c) further explained that section's constitutionality and consistency with *Reynolds v. Sims*.

> [S]ection 203(c) of the Covenant reflected a compromise satisfactory to all representatives that the populous island of Saipan not dominate the legislature . . . [¶] Sound reasons of public policy support the constitutionality of the legislative arrangement established by the Covenant and

> implemented by the Constitution. First, unlike the underrepresented voters in Reynolds v. Sims, supra, the people of Saipan in the plebiscite on the Covenant freely and overwhelmingly approved the provision that gave Rota and Tinian a majority of the members in one house of the legislature. The people of Saipan relinquished the degree of control that its population alone would permit in order to achieve a form of government acceptable to all of the people of the Commonwealth. This relinquishing of power was done by the people themselves and not by representatives . . . In adopting the Covenant the Congress recognized the necessity for, and the value of, an equal apportionment of senators among the three municipalities . . . [¶] Second, the islands of Rota and Tinian differ from the rural counties whose control of the Alabama legislature was held unconstitutional by the Court in Reynolds. Rota, Saipan and Tinian are island communities separated by ocean and characterized by different customs and history. The people of each of these islands have a substantial need to protect their traditions. The Commonwealth shares the compelling interest to safeguard each of its indigenous island-societies. An equal voice in the senate for Rota, Saipan and Tinian is the means most narrowly tailored to the realization of this objective.

ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 29-31 (Dec. 6, 1976) (Def. Exh. 5).

As emphasized by the Covenant's chief congressional sponsor, inter-island legislative equality was *more* essential to the CNMI's formation than legislative equality among States was to formation of the Union that became the United States.

> Article II, section 203(c) . . . is based on the very large disparity in population between the municipalities on Saipan and the municipalities on the other islands . . . More importantly, the centuries-old history of the Mariana Islands is based on the tradition of the significance of land to the people and, therefore, the relative equality and independence of each island. In this respect, *the concept is even stronger than the original concept of the equality of our States* and we on the committee believe that this concept is understandable and acceptable.

122 CONG. REC. 7272-7273 (1976) (remarks of Representative Phillip Burton) (emphasis added) (Def. Exh. 3).

The federal analogy addressed in *Reynolds v. Sims* applies squarely here. Prior to the Covenant, the Northern Mariana Islands were independent sovereigns, as were the original thirteen States before entering the Union. *Ngiraingas*, 858 F.2d at 1371 n.1; *Ralpho*, 569 F.2d at 619 n.71; *Temengil*, 881 F.2d at 649 n.1, 650; *Porter*, 496 F.2d at 588 n.4; *Temengil*, 33 Fair Empl. Prac. Cas. at 1031-1032 & n.16; *People of Saipan*, 356 F. Supp. at 650 n.10, 653 n.18. Like these States, the Northern Mariana Islands surrendered part of their sovereignty and entered into a political union with each other and the United States, conditioned in part on equal Senate representation intended to preserve their "residuary sovereignty." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 551-552 (1985); *see* MARIANAS POLITICAL STATUS COMMISSION POSITION PAPER ON LIMITATION OF FEDERAL AUTHORITY 31 (Dec. 6, 1973) (Leg. Exh. U). Because the federal analogy establishes a compelling basis for the constitutionality of Covenant Section 203(c) and CNMI Constitution Section 2(a), it provides an independent basis for summary affirmance.

CONCLUSION

This case does not present a substantial federal question warranting plenary review. It has no conceivable impact or importance beyond the distant borders of the Northern Mariana Islands. Moreover, the unanimous three-judge district court correctly entered judgment for Appellees on undisputed evidence and properly applied the *Insular Cases* doctrine. For these reasons, the judgment should be summarily affirmed without further briefing or oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS DATED AND FILED MAY 14, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

Civil Action No. 97-0029

JEANNE H. RAYPHAND and STANLEY T. TORRES,

Plaintiffs

v.

MIGUEL M. SABLAN, VICENTE N. ATALIG, GEORGE O. HOCOG, MARIA B. DIAZ, VICENTE H. BORJA, FRANCES M. SABLAN, RAMON A. TEBUTEB and CONNIE SEMAN-CAMACHO, Members, Board of Elections, and JUAN M. DIAZ, Executive Director, Board of Elections (in their official capacities only),

Defendants

UNITED STATES OF AMERICA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, MAYOR OF ROTA, MAYOR OF TINIAN, and ELEVENTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE,

Intervenors

JUDGMENT

PURSUANT TO the Order entered May 5, 1999, in which Defendants' motion for summary judgment was

granted and Plaintiff's motion for summary judgment was denied, judgment is hereby entered in favor of defendants and against plaintiffs.

Dated this 14th day of May, 1999.

s/ Galo L. Perez
Galo L. Perez
Clerk of Court

APPENDIX — ROTA MUNICIPAL COUNCIL RESOLUTION NO. 11MC-27-1975 ADOPTED JANUARY 20, 1975 AND FILED AS LEG. EXH. Q

11th Rota Municipal Council
First Regular Session, 1975

Resolution No. 11MC-27-1975
Introduced by: Council of the Whole

A RESOLUTION STATING THE POSITION OF THE PEOPLE OF ROTA, THROUGH THEIR ELECTED OFFICIALS, RELATIVE TO THE FUTURE GOVERNMENT OF THE NORTHERN MARIANA ISLANDS

WHEREAS, the people of Rota fully recognize that the future of Rota as well as the future of the rest of the Northern Mariana Islands will be greatly affected by decisions made during the Fifth Regular Session of the Mariana Islands District Legislature; and

WHEREAS, the Rota Municipal Council, speaking on behalf of the people of Rota seek to have its views heard and heeded by the members of the Mariana Islands District Legislature; and

WHEREAS, the Council cannot overemphasize the importance which it attaches to the following Position Statement and will closely observe to what extent it is recognized and acted upon by the Mariana Islands District Legislature; now, therefore,

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BE IT RESOLVED by the 11th Rota Municipal Council in its First Regular Session 1975, that the following Position Statement is hereby set forth for consideration by the Mariana Islands District Legislature and other interested parties:

The People of Rota are concerned over the proposed "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" which will most probably be signed by the Mariana Islands Political Status Commission and the United States delegation during the early part of February, 1975. That proposed Covenant provides for the establishment of a Constitution for the Future Government of the Northern Mariana Islands.

The concern felt by the people of Rota stems from both a disenchantment with the past and a guarded optimism about the future. Under the present Trust Territory Administration, Rotanese have consistently been treated as the poor cousins of our Saipan neighbors. We have submitted budget requests which have been ignored, while the approved budget affecting Rota is controlled and administered by the District Administration on Saipan. We have sought financial assistance from the District Legislature for our Municipal Operating expenses and the response has been unsatisfactory. Unfortunately, these requests were made necessary by a combination of factors including the limitations placed on our municipal taxing powers under the Trust Territory Code. Recommendations made by our District Administrator's Representative and his department heads, our Municipal Council, and our Mayor have been consistently disregarded.

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The people of Rota wish to be a part of the Commonwealth of the Northern Mariana Islands. However, the people of Rota cannot approve a form of government which will perpetuate the discrimination practiced in the past against our island community. To clearly indicate our intentions, we submit the following four proposals which must be adopted if Rota is to participate as a political part of the future government of the Northern Mariana Islands.

1. *Equal Numbers of Constitutional Conventions [sic] Delegates From Each Municipality.*
Each municipality must be provided an equal number of delegates to the constitutional convention provided for by the Mariana Islands District Legislature. In making this proposal, the Rota people are concerned most with creating a fair, representative, and harmonious constitutional convention. Any variation in the number of delegates from any single municipality should be made only after receiving the approval of each municipal council in the Mariana Islands District.

2. *Bicameral Legislature.*
The central government legislature must be bicameral, with a Senate composed of equal representation from each of the present municipalities and a House of Representatives based on population figures and traditional voting patterns. This plan will help protect the interests of Tinian and Rota while ensuring Saipan a healthy majority in the House of Representatives. A bicameral Legislature is indispensable to the fair and equal treatment of Tinian and Rota. In addition it would be in keeping with the proposed covenant which specifically permits "distribution of the Legislature's

membership on the basis of appropriate considerations in addition to population . . ." (see section 203 (c).)

3. *Local Budgetary Controls.*
Any governmental Framework created by the future constitution must provide for local control and disbursement of those monies made available to, what are now the municipalities. Both during the transition period and after the termination of the trusteeship agreement, each municipality must be given full authority over the administration of funds provided by the central government legislature.

4. *Plebiscite on Covenant and Referendum on Constitution to be Held Simultaneously.*
The Covenant and the Constitution, by their nature, will be closely related, interdependent documents. We feel strongly that the people of the Northern Mariana Islands should be given the opportunity to accept or reject them at one time. This will permit a longer period of political education and a smaller financial burden for our District Legislature; and

BE IT FURTHER RESOLVED, that certified copies of this resolution be transmitted to the Chairman of the Marianas Political Status Commission; to the President's Personal Representative for Micronesian Status Negotiations; to the President of the Mariana Islands District Legislature; to the Rota Representatives of the Mariana Islands District Legislature; to the District Administrator, Marianas; and to the District Administrator's Representative, Rota; also to the Secretary of the Department of the Interior; to the High

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Commissioner of the Trust Territory of the Pacific Islands; and to the Rota Representatives to the Marianas Political Status Commission.

Duly adopted this 20th day of January, 1975.

s/ Misael H. Ogo
Misael H. Ogo
Speaker

s/ Jesus A. Songsong
Attested by: Jesus A. Songsong
Council Secretary

APPENDIX — CONSTITUTIONAL PROVISIONS AND FEDERAL LAWS INVOLVED

Section 105 Of The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America

The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

Pub. L. No. 94-241, 90 Stat. 263, 264, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999).

Section 203(c) Of The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America

The legislative power of the Northern Mariana Islands will be vested in a popularly elected

legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of the bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

Pub. L. No. 94-241, 90 Stat. 263, 265, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999).

Section 501 Of The Covenant To Establish A Commonwealth Of The Northern Mariana Islands In Political Union With The United States of America

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3 and 8; Article I, Section 10; Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26. . . . Other provisions of or amendments to the Constitution of the United States, which do not

apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

Pub. L. No. 94-241, 90 Stat. 263, 267, 42 U.N. TCOR Annex, U.N. Doc. T/1759 (1975), 48 U.S.C. § 1801 & note (West Supp. 1999).

Northern Mariana Islands Constitution — Section 2(a)

The senate shall consist of nine members with three members elected at large from each of three senatorial districts. The first senatorial district shall consist of Rota, the second senatorial district shall consist of Tinian and Aguiguan, and the third senatorial district shall consist of Saipan and the islands north of it.

1 N. Mar. I. Code p. B-303; *see* J.S. 2.

Appendix

United States Constitution — Territorial Clause

Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. Art. IV, Sec. 3, Cl. 2.

United States Constitution — Fifth Amendment Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law [.]

U.S. Const. Amend. V.

United States Constitution — Fourteenth Amendment Equal Protection Clause

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.